No. 80-41

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In The

Supreme Court of the United States

October Term, 1980

PEOPLE OF THE STATE OF ILLINOIS, *et al.*
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the I.C.C. fulfilled its responsibilities under the Interstate Commerce Act and National Environmental Policy Act, in approving a consolidation of railroad facilities at Yard Center, Ill., by deference to local, state, and other federal agencies for enforcement of the environmental consequences of the pre-existing and cumulative impact of the consolidation, rather than by the I.C.C. itself imposing environmental conditions to its approval.*

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*Petitioners in the court of appeals are People of the State of Illinois (William J. Scott, Attorney General, and Environmental Control Division), Illinois Commerce Commission, Village of Dolton, Village of Lansing, Village of South Holland, John W. McGinness and Jack O. Black (United Transportation Union); Respondents are Interstate Commerce Commission, United States of America, and Louisville & Nashville Railroad Company.

CONTENTS

Page

QUESTION PRESENTED ..... Preface

OPINIONS BELOW 1

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT 3

The I.C.C.'s Reversal of the ALJ's Decision 6

Affirmance by Court of Appeals 9

REASONS FOR GRANTING THE WRIT 9

I. THE ISSUE IS OF PUBLIC IMPORTANCE IN LIGHT OF THE RESURGENCE OF RAILROAD CONSOLIDATION PROPOSALS 10

II. THE I.C.C.'s DEFERENCE OF ENVIRONMENTAL ENFORCEMENT TO OTHER AGENCIES IN LIEU OF IMPOSING CONDITIONS RAISES IMPORTANT FEDERAL JURISDICTIONAL AND PROCEDURAL PROBLEMS 11

CONCLUSION 14

APPENDIX

Opinion of Court of Appeals (April 24, 1980) 1a

Report of Interstate Commerce Commission (March 29, 1979) 10a

Decision of Interstate Commerce Commission on petitions for administrative review (July 19, 1979) 23a

Decision of Administrative Law Judge (served July 13, 1978) 27a

PREVIOUS PAGE WAS BLANK

Judgment of Court of Appeals (April 24, 1980) 57a

Order of Court of Appeals denying rehearing (June 5, 1980) 58a

Citations

Cases:

Burlington Northern, Inc.-Control & Merger, St. L., 360 I.C.C. 783 (1980) 10

Chicago, M. St. P. & P.R. Co.-Trackage Rights, 342 I.C.C. 578 (1973), sustained sub nom. Louisville and Nashville Railroad Co. v. United States, 369 F. Supp. 621 (W.D. Ky. 1973), aff'd per curiam 414 U.S. 1105 12

Dean Milk Co. v. Madison, 340 U.S. 349 (1951) 13

Environmental Defense Fund, Inc. v. Armstrong, 352 F. Supp. 50 (N.D. Calif. 1972), aff'd 487 F.2d 814, cert. den. 416 U.S. 974 11

Hanly v. Kleindienst, 484 F.2d 448 12d Civ. 1973), cert. den. 416 U.S. 936 ..... *11*

Louisville & N.R. Co.-Merger-Monon Railroad, 338 I.C.C. 134 (1970) 12

Louisville & N.R. Co.-Pur.-Chicago & E.I.R. CO., 334 I.C.C. 273 (1968) 7, 12

Louisville & N.R. Co. Trackage Rights, 334 I.C.C. 412 (1969) 7, 12

Louisville & N.R. Co.-Trackage Rights, 360 I.C.C. 115 (1979) ..... *passim*

Missouri Pac. R. Co.-Control-Chicago & E.I.R. Co., 327 I.C.C. 279 (1965), sustained sub nom. Illinois Central Railroad Co. v. United States, 263 F. Supp. 421 (N.D. Ill. 1966), aff'd per curiam 385 U.S. 457 (1967) 12

Norforlk & W.R. Co.-Control-Detroit, T. & I.R. Co.,
360 I.C.C. 498 (1979) and 363 I.C.C. 122 (1980) 10

Northern Lines Merger Cases,
396 U.S. 491 (1970) 10

Penn-Central Merger Cases,
389 U.S. 486 (1968) 10

Pike v. Bruce Church, Inc.,
379 U.S. 137 (1970) 13

Palisades Citizens Association, Inc. v. C.A.B.,
420 F.2d 188 (D.C. Cir. 1969) 13

Raymond Motor Transportation, Inc. v. Rice,
434 U.S. 429 (1978) 13

Seaboard Air Line R. Co. v. United States,
382 U.S. 154 (1965) 10

Statutes:

28 U.S.C. 1254(1) 2

28 U.S.C. 2101(c) 2

28 U.S.C. 2341 4

42 U.S.C. 4331 ..... 2, 3, 11, 12

42 U.S.C. 4332 ..... 2, 3

49 U.S.C. 1(18) (1977) 4

49 U.S.C. 5(2)(b) (1977) 10

49 U.S.C. 10901 ..... 2, 3

49 U.S.C. 11343 ..... 2, 4, 10, 11, 13

49 U.S.C. 11344 ..... 2, 3

P.L. 95-473 4

In The

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, People of the State of Illinois, Illinois Commerce Commission, Village of Dolton, Village of Lansing, Village of South Holland, John W. McGinness, and Jack O. Black, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in this proceeding on April 24, 1980.

OPINIONS BELOW

The opinion of the court of appeals (App., 1a-9a) is not reported. The decision of the Interstate Commerce Commission (App., 10a-22a) is reported at 360 I.C.C. 115.

JURISDICTION

The judgment of the court of appeals (App., 57a) was entered on April 24, 1980. The petitioners' timely petition for rehearing was denied on June 5, 1980 (App., 58a).

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2101(c).

STATUTES INVOLVED

The statutes primarily involved are sections 101 and 102(1) of National Environmental Policy Act, 42 U.S.C. 4331 and 4332(1) and sections 10901(a) and 11344(c) of Title 49 United States Code, which provide as pertinent:

> 42 U.S.C. 4331(a). The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and

other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may –

42 U.S.C. 4332(1): The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, . . .

49 U.S.C. 10901(a): A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 103 of this title may (1) construct an extension to any of its railroad lines . . . . only if the Commission finds that the present or future public convenience and necessity require or will be enhanced by the construction . . . . and operation of the railroad line.

49 U.S.C. 11344(c). The Commission shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest.

STATEMENT

The proceeding involves a petition for review of a decision of the Interstate Commerce Commission ("I.C.C.").

28 U.S.C. 2341, et seq. *Louisville & N.R. Co. - Trackage Rights,* 360 I.C.C. 115 (1979).

The issues embrace the I.C.C.'s administration of the provisions of National Environmental Policy Act (NEPA) in the context of a railroad's effort to consolidate yard facilities in the Chicago, Ill. area.

Louisville & Nashville Railroad Company ("L&N") uses two freight yards in the Chicago area. One is a joint facility with a second railroad[1] at Yard Center, situated in Dolton and South Holland, Illinois. The other is L&N's own yard located at South Hammond, Indiana. L&N seeks to abolish its own yard at South Hammond, and to consolidate the work at Yard Center. To accomplish this it filed two applications with the I.C.C.; one to construct a line of railroad at Munster, Indiana between its own line and that of Grand Trunk Western Railroad Company ("GTW") under the provisions of 49 U.S.C. 10901,[2] the other to acquire trackage over the GTW between Munster and Thornton Junction, Illinois, the latter point adjacent to Yard Center, under the provisions of 49 U.S.C. 11343.[3] (App., 11a, 28a).

The I.C.C.'s Administrative Law Judge ("ALJ") denied both applications. He found that the rerouting of traffic into Yard Center would result in an increase in traffic. (App., 11a), but that L&N had not shown that conditions

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[1]Missouri Pacific Railroad Company.

[2]Formerly, section 1(18) of the Interstate Commerce Act, 49 U.S.C. 1(18) (1977). The act was recodified by P.L. 95-473 (1978).

[3]Formerly, section 5(2)(b) of the Interstate Commerce Act, 49 U.S.C. 5(2)(b) (1977).

at Yard Center are consistent with acceptable levels of local public health, safety, and noise pollution factors. (App., 53a). He concluded that there was an "appalling" lack of sensitivity and concern with public health at Yard Center (App., 53a):

> ". . . this record indicates an appalling lack of sensitivity and concern with public health and safety, noise pollution, and community relations on the part of the operators of Yard Center. Among others, two things stand out as examples in support of the latter conclusion. These are the condition of the fire hydrants in Yard Center (and management's apparent lack of interest in corrective measures), and management's 'token' noise pollution control efforts in installing inappropriate and insufficient plant material. As noted by a witness, the planting efforts were so grossly inadequate as to be an insult to the people of South Holland. Of course, the deficiencies in fire fighting facilities have been of especially high public concern as a result of recent publicity given to derailments and fires in other parts of the country."

In denying the application, the ALJ recommended the imposition of 8 environmental conditions if the applications were approved upon a finding that the railroads at Yard Center could or would abide by the conditions. These 8 conditions were (App., 53a-54a):

> "(1) complete rehabilitation of the Yard Center fire hydrants and water mains to standards acceptable to the Villages of Dolton and South Holland, (2) development of plans including pro-

visions for immediate emergency access to the control function by public safety officials, (3) joint construction with the Villages of Dolton and South Holland of pedestrian overpasses at 144 St. in Dolton and 170 St., in South Holland, (4) development of plans to regulate and control the placement of idling equipment, (5) limitation to switch engines with lower noise emission ratings, (6) development of a plan and installation of an extensive system of suitable noise barriers around Yard Center, (7) designation of a specific official and an alternative to be responsible for Yard Center and related activities and facilities and the provision of access to these persons by appropriate local governmental officials, and (8) designation of a community relation representative with plans for the provision of timely receipt of and action on complaints."

The I.C.C.'s Reversal of the ALJ's Decision

The I.C.C. reversed the ALJ and granted the applications. (App., 10a-22a) The I.C.C. stated that National Environmental Policy Act mandates that environmental concerns are to be considered in determining if a transaction is in the public interest. However, the weight to be given environmental concerns is that an application should be denied only when the harmful impacts outweigh[4] the benefits to be gained from the proposal. 360 I.C.C. at 118 (App., 14a):

"In other words, NEPA mandates that environmental concerns are to be considered in

[4]Initially, the I.C.C. used the term "far outweigh", but the word "far" was deleted on reconsideration. (App., 25a).

> determining if a transaction is in the public interest.
>
> . . . . .
>
> "On a case-by-case basis, the benefits from a proposed action must be balanced against the harmful environmental impacts. An application should be denied only when the harmful environmenmtal impacts far outweight the benefits to be gained from the proposal."

The I.C.C. ruled the environmental concerns and adverse conditions essentially are preexistent.[5] It concluded that the benefits both environmental and operational outweigh certain harmful environmental impacts. 360 I.C.C. at 119. (App., 16a).

The I.C.C. rejected the conditions proposed by the ALJ on the ground that the conditions relate to protection against environmental consequences subject to the regulation of other Federal, State, and local agencies; that the record does not show the cost of compliance with the conditions; and that these other agencies are the appropriate authorities to enforce compliance.[6] (App., 17a):

> "All of the conditions proposed by him relate to protecting against environmental consequences subject to the regulation of other Federal, State,

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[5]However, upon reconsideration the I.C.C. stated it considered the cumulative impact – both pre-existing and incremental. (App., 25a) Traffic at Yard Center increased dramatically with L&N's acquisition of the so-called Evansville line. See: *Louisville & N.R. C. - Pur. -Chicago & E.I.R. Co.*, 334 I.C.C. 273 (1968); *Louisville & N.R. Co. Trackage Rights*, 334 I.C.C. 412 (1969).

[6]The I.C.C. also stated it had no reasons to believe the railroads will fail to comply with local regulations, which contradicts the ALJ's findings but is not essential to the point at issue.

> and local agencies. We are particularly concerned that the record does not show the cost of compliance with the recommended conditions, many of which relate to local and State police power. We have no reason to believe that the railroads will fail to comply with all appropriate statutes and regulations administered by those agencies. However, in the event that they do not comply, those agencies and not this Commission are the appropriate authorities to enforce compliance."

Chairman O'Neal, concurring in part, would impose a condition to require the necessary fire hydrants and crossover tracks, so as to ensure compliance with local requirements. He stated the I.C.C. was in an "ideal position". 360 I.C.C. at 120 (App.,17a-18a):

> "I also agree that the conditions proposed by the Administrative Law Judge are largely within the control of other Federal, State, and local agencies . . . .
>
> "Nonetheless, I believe that the Commission is in an ideal position to ensure compliance with those conditions. . . ."

Commissioner Stafford disssented. He pointed out that Yard Center does not contain adequate fire protection facilities, and that L&N has not controverted this nor shown that rehabilitation of the water main would be financially burdensome. Further Yard Center is already subjected to noise levels which frequently violate Environmental Policy Act, State, and local noise standards. He would recommend adoption of three of the conditions proposed by the ALJ. 360 I.C.C. at 120-21 (App., 18a-20a).

Affirmance by Court of Appeals

The court of appeals affirmed the majority I.C.C. decision (App., 1a-9a). The unpublished order dealt with inconsistencies between the agency decision and the agency stay order (App., 3a-4a), and discussed various challenges to the ALJ's handling of the hearings (App., 6a-9a). However, little attention was devoted to the matter of the agency findings which reversed those of the ALJ. The court of appeals summarily ruled (App., 5a):

> "In its April 21, 1979 Certificate and Decision, the ICC expressed clearly its belief that the findings made by the ALJ were sufficient to sustain the granting of the L&N applications. The Commission then concluded that, based upon said findings, reversal of the initial decision was required. It also, while so acting, noted that the ALJ, in denying said applications, appeared to have relied to an untenable extent upon matters he (the ALJ) himself recognized as being only collateral to the controlling issues. The Commission thus, in our view, more than "made clear not only its awareness of what the (ALJ) had concluded, but also its reasons for taking a different course." *Greater Boston Television Corp.* v. *FCC,* 444 F.2d 841, 853 (D.C. Cir. 1970), *cert. denied,* 403 U.S. 923 (1971)."

REASONS FOR GRANTING THE WRIT

The court of appeals has decided an important question of federal law which should be settled by this Court.

The court of appeals affirmed the decision of the I.C.C. to approve a railroad facility consolidation, and rejected

environmental protective conditions which had been proposed by the ALJ in his initial decision. The I.C.C. would leave the environmental consequences to the enforcement of local, state, and other federal agencies.

I. THE ISSUE IS OF PUBLIC IMPORTANCE IN LIGHT OF THE RESURGENCE OF RAILROAD CONSOLIDATION PROPOSALS.

The matter of the I.C.C.'s environmental responsibilities in passing upon railroad facility consolidations under 49 U.S.C. 11343 (formerly section 5(2) of the Interstate Commerce Act), which involves mergers, trackage rights, leases, etc., has not heretofore come before the Court in a major proceeding. The railroad merger wave of the 1960's occurred prior to enactment of National Environmental Policy Act of 1969, so that the interplay between NEPA and the former section 5(2) was not drawn in question.[7]

Now, after about a 10-year span of dormancy, railroad consolidations are again in the forefront at the I.C.C. The I.C.C. recently authorized Grand Trunk Western Railroad Company to control Detroit, Toledo and Ironton Railroad Company and Detroit and Toledo Shore Line Railroad Company. *Norfolk & W.R. Co. - Control - Detroit, T. & I.R. Co.*, 360 I.C.C. 498 (1979) and 363 I.C.C. 122 (1980). See also: *Burlington Northern, Inc. - Control & Merger, St. L.*, 360 I.C.C. 783 (1980).

Other railroads have announced unification plans, which are pending or anticipated at the I.C.C., such as

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[7]See, e.g. *Seaboard Air Line R. Co.* v. *United States*, 382 U.S. 154 (1965); *Penn-Central Merger Cases*, 389 U.S. 486 (1968); *Northern Lines Merger Cases*, 396 U.S. 491 (1970).

Chessie-Seaboard Coast Line, Southern-Norfolk & Western, Southern Pacific-Santa Fe, and Union Pacific-Western Pacific-Missouri Pacific.

Environmental considerations are surely to arise in the context of the I.C.C.'s consideration of NEPA in its administration of 49 U.S.C. 11343, et seq. The I.C.C.'s approval of the Yard Center consolidation provides the Court with the opportunity to settle the law on this score at an early stage, to the benefit of the public interest.

II. THE I.C.C.'s DEFERENCE OF ENVIRONMENTAL ENFORCEMENT TO OTHER AGENCIES IN LIEU OF IMPOSING CONDITIONS RAISES IMPORTANT FEDERAL JURISDICTIONAL AND PROCEDURAL PROBLEMS.

The I.C.C.'s deference to environmental enforcement by local, state, and other federal agencies, rather than through the imposition of environmental conditions to its approval of the transaction, raises important matters of jurisdiction and procedure.

Section 101(b) of NEPA, 42 U.S.C. 4331(b), directs harmonization of state and federal action. *Environmental Defense Fund, Inc.* v. *Armstrong,* 352 F. Supp. 50, 58 (N.D. Calif. 1772), aff'd 487 F.2d 814, cert. den. 416 U.S. 974:

> "Basically, NEPA command a harmonization of state and Federal agency action."

Consultation and coordination between federal and local officials . . . "should be done as a matter of common sense." *Hanly* v. *Kleindienst,* 484 F.2d 448, 449 (2nd Cir. 1973), cert. den. 416 U.S. 936.

Here, as a practical matter, it is the I.C.C.'s approval of a series of transactions which has greatly increased the amount of freight traffic flowing into and through Yard Center. *Missouri Pac. R. Co. - Control - Chicago & E.I.R. Co.*, 327 I.C.C. 279 (1965), sustained sub nom. *Illinois Central Railroad Company* v. *United States*, 263 F. Supp. 421 (N.D. Ill. 1966), aff'd *per curiam* 385 U.S. 457 (1967); *Louisville & N.R. Co. - Pur. - Chicago & E.I.R. Co.*, 334 I.C.C. 273 (1968); *Louisville & N.R. Co. Trackage Rights*, 334 I.C.C. 412 (1969). The present proposal to abolish the South Hammond yard and transfer the operations to Yard Center dates from the I.C.C.'s approval of the L&N - Monon merger. *Louisville & N.R. Co. - Merger - Monon Railroad*, 338 I.C.C. 134 (1970); *Chicago, M. St. P. & P.R. Co. - Trackage Rights*, 342 I.C.C. 578 (1973), sustained sub nom. *Louisville and Nashville Railroad Co.* v. United States, 369 F. Supp. 621 (W.D. Ky. 1973), aff'd *per curiam* 414 U.S. 1105.[8]

Section 101(a) of NEPA, 42 U.S.C. 4331(a), requires that the Federal government in cooperation with State and local governments use "practicable" means. Here, the I.C.C. has approved a transaction without knowing the cost of complying with adequate environmental protection. (App., 17a).

Further, attempts at local enforcement of health and safety regulations frequently are met with claims that such regulations unconstitutionally burden interstate commerce. It would seem prudent that the I.C.C., rather than the courts, first make an evaluation when initially approv-

[8]Upon reconsideration, the I.C.C. acknowledged the cumulative impact. (App., 25a).

ing the additional rail traffic movement. *Raymond Motor Transportation, Inc.* v. *Rice,* 434 U.S. 429 (1978); *Pike* v. *Bruce Church, Inc.*, 379 U.S. 137, 142 (1970); *Dean Milk Co.* v. *Madison,* 340 U.S. 349 (1951).

The I.C.C. has failed in its task to accommodate NEPA with 49 U.S.C. 11343. Even prior to NEPA, in situations involving the certification of additional airlines at a community where noise levels would be raised, the Civil Aeronautics Board was empowered to impose environmental conditions. *Palisades Citizens Association, Inc.* v. *C.A.B.*, 420 F.2d 188, 192 (D.C. Cir. 1969). Indeed, the I.C.C. here did not disavow its power to impose conditions. 360 I.C.C. at 119. (App., 17a). The agency simply did not do so, but has unloaded the problems upon other public bodies rather than use its "ideal position" to ensure compliance with environmental standards. (dissent of Chairman O'Neal, App., 17a-18a).

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals in this case.

Rspectfully submitted,

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JULY 1980

UNPUBLISHED ORDER NOT TO BE CITED
PER CIRCUIT RULE 35

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604
Argued: February 27, 1980
April 24, 1980

Before
Hon. LUTHER M. SWYGERT, Circuit Judge
Hon. PHILIP W. TONE, Circuit Judge
Hon. NICHOLAS J. BUA, District Judge*

PEOPLE OF THE STATE OF ILLINOIS, ILLINOIS COMMERCE COMMISSION, VILLAGE OF DOLTON, VILLAGE OF LANSING, VILLAGE OF SOUTH HOLLAND, JOHN W. McGINNESS AND JACK O. BLACK,
No. 79-1454

Petitioners,

vs.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,

Respondents.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,

Intervening-Respondent.

ON PETITION FOR REVIEW OF AN ORDER FROM THE INTERSTATE COMMERCE COMMISSION

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*District Judge Nicholas J. Bua of the Northern District of Illinois is sitting by designation.

ORDER

The present matter involves a petition for review of a Certificate and Decision of the Interstate Commerce Commission [the ICC or Commission], served April 2, 1979, authorizing the Lousiville and Nashville Railroad Company [L&N] to: (1) pursuant to section 5(2) of the Interstate Commerce Act, 49 U.S.C. § 11343, et seq., acquire certain trackage rights, covering a distance of approximately 5.6 miles, over the Grand Trunk Western Railroad Company [GTW] mainline running between Munster, Indiana and Thornton Junction, Illinois; and (2) pursuant to section 1(18) of the Interstate Commerce Act, 49 U.S.C. § 10901, construct and operate a short length of connecting track between a now existing L&N line and the aforementioned GTW mainline. Said Certificate and Decision reversed the initial decision rendered by the Administrative Law Judge [ALJ], served July 13, 1978, denying the L&N applications.

The petitioners in this matter are the People of the State of Illinois[1], the Illinois Commerce Commission, the Villages of Dolton, Lansing and South Holland, Illinois, and the United Transportation Union. Named as respondents are the ICC and the United States of America.[2] Intervening as a respondent is the L&N.

In a decision served August 8, 1979, the ICC, speaking through Chairman O'Neal, directed that the effective date of the April 2, 1979 Certificate and Decision be stayed pending completion of the judicial review of its [the Com-

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[1]The People of the State of Illinois are represented by the Illinois Attorney General, William J. Scott.

[2]The United States of America is joined solely as a statutory respondent 28 U.S.C. § 2322.

mission's] determinations. The present matter accordingly is before the court in that posture.

In contending that the Certificate and Decision at issue should not be allowed to stand as presented, the petitioners first argue that said Certificate and Decision must be set aside, and the proceedings accordingly remanded, to allow the ICC to explain certain alleged inconsistencies in its findings. In support of this argument, the petitioners note initially that the Commission, when reversing the initial decision of the ALJ, indicated that applications of the type filed by L&N

> should be denied only when the harmful environmental impacts . . . outweigh the benefits to be gained from the proposal.

They next point out that Chairman O'Neal, in the stay order served August 8, 1979, found that said stay was warranted because

> [c]onsidering the relative balance of harms involved in this proceeding, it is concluded that the possibility of environmental damage resulting from consummation of the approved transaction outweights L&N's projected loss of operating savings attributable to a delay in consummating the transaction.[3]

These findings, the petitioners contend, are markedly inconsistent, and thus require that the instant proceedings be remanded in order that such inconsistencies may be explained. The court does not agree. We believe, to the contrary, that if the statements in questions are considered in

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[3]A similar finding was made by the ICC, again speaking through Chairman O'Neal, in a related stay order served June 11, 1979.

their relevant contexts, the ICC's findings are entirely consistent. In its April 2, 1979 Certificate and Decision, the Commission concluded that, on balance, any environmental damage which would result from the granting of the L&N applications would, over time, be outweighed by the benefits that ultimately would accrue from the applicant's proposals. It was, therefore, the long-term effects of granting the L&N applications which were balanced by the ICC in its April 2nd decision. In staying the effective date of that decision on August 8th, Chairman O'Neal did not contradict this earlier finding of the Commission. The Chairman in his analysis, basically weighed the potential for immediate environmental harm against the effect on the L&N of delaying implementation of its applications until such time as the judicial review was completed. The focus of his analysis thus was on the short-term. That being so, any apparent inconsistency in the two findings clearly can be reconciled by giving appropriate consideration to the time frame relevant to the conclusion reached.

The petitioners next contend that the April 2, 1979 Certificate and Decision, as it now reads, cannot withstand judicial review because the Commission failed in said Certificate and Decision to present findings adequate to support its reversal of the initial decision of the ALJ. That being so, they argue, the proceedings must be remanded "to enable the ICC to state its reasons for differing with the ALJ." Brief for Petitioners, at 23.

The court finds this argument also to be without merit. Although as the petitioners correctly note, it is the policy in this Circuit that, in situations where an administrative agency differs in result from the conclusions of the Administrative Law Judge, said agency ordinarily should give reasons for its departures therefrom, *see e.g., Snap-On Tools Corp. v. FTC,* 321 F.2d 825, 837 (7th Cir. 1963);

Deepfreeze Appliance Div., General Motors Corp. v. NLRB, 211 F.2d 458, 460-61 (7th Cir. 1954), we believe this standard has been adequately satisfied in the present matter. In its April 2, 1979 Certificate and Decision, the ICC expressed clearly its belief that the findings made by the ALJ were sufficient to sustain the granting of the L&N applications. The Commission then concluded that, based upon said findings, reversal of the initial decision was required. It also, while so acting, noted that the ALJ, in denying said applications, appeared to have relied to an untenable extent upon matters he [the ALJ] himself recognized as being only collateral to the controlling issues. The Commission thus, in our view, more than "made clear not only its awareness of what the [ALJ] had concluded, but also its reasons for taking a different course." *Greater Boston Television Corp. v. FCC,* 444 F.2d 841, 853 (D.C. Cir. 1970), *cert. denied,* 403 U.S. 923 (1971).

It also is contended that the ICC, in refusing to reopen the present matter and consolidate it with certain other proceedings instituted in 1979, acted improperly. With respect to this contention, it first must be noted that administrative agencies, when determining whether related proceedings should be consolidated, have broad discretion. Such clearly is well settled. *Association of Massachusetts Consumers, Inc. v. SEC,* 516 F.2d 711, 714 (D.C. Cir. 1975), *cert. denied,* 423 U.S. 1052 (1976); *City of San Antonio v. CAB,* 374 F.2d 326, 328-29 (D.C. Cir. 1967); *see American Trucking Associations, Inc. v. United States,* 326 U.S. 77, 83 (1945). As that is so, the petitioners' argument in this regard must fail. Simply put, from the record presented it cannot reasonably be concluded that the actions complained of on the part of the ICC, i.e. the agency's refusal to grant the petitioners' requests to reopen the instant matter to allow for consolida-

tion of it, in any way constitute an abuse of the Commission's afore-noted discretion.

The petitioners' final argument is that the Certificate and Decision at issue must be set aside because the hearing conducted before the ALJ was fundamentally unfair. In this regard, the petitioners first contend that the ALJ's actions in requiring them to, over objection, conduct an immediate cross-examination of the L&N's technical witnesses were improper and erroneous. Said contention is premised upon the petitioners' allegation that the L&N was directed at the prehearing conference to submit to them in advance of the hearing the testimony of the witnesses in question, and that it [the L&N] failed to do so.[4] Under such circumstances, they accordingly argue, the requirement that they commence cross-examination on the L&N's highly technical presentation "almost immediately" was patently unreasonable.

This contention of the petitioners was specifically addressed by the ALJ in his initial decision, wherein he stated:

> . . . a prehearing conference was held in April of 1977. No report was issued, apparently because of the [prehearing conference ALJ's subsequent] departure from this agency. Although the matter was set for hearing without any further comment upon items discussed at the prehearing conferences, such as prefiling of evidentiary statement, the complaining parties made no timely, formal effort by motion or petition to clarify matters or obtain relief they (thought)

[4]Such testimony was submitted to the petitioners, in documentary form, immediately before the hearing.

> necessary.[5] At the hearing, the parties were allowed adequate time to examine applicant's statements (the longest of eight statements was 12 pages), including a 2-hour and 40 minute recess starting at 10:50 a.m. on the first day of hearing (statements were distributed prior to the start of the hearing). No showing is made of how the lack of provision of prefiling adversely affect these parties. No showing is made to justify their lack of diligence in seeking appropriate relief prior to the start of the hearing and it appears that such failure, followed by their subsequent actions, could be found to constitute an attempt to take unfair procedural advantage of applicant in a manner that would affect the timely disposition of the proceedings.

Initial Decision, at 4; Joint Appendix (Vol. I), at 23. The court finds the reasoning and conclusions of the ALJ as to this issue to be both persuasive and accurate in law. The propriety of the ALJ's decision, moreover, is highlighted and strengthened by the petitioners' noticeable lack of diligence in attempting to resolve the problems now complained of prior to the commencement of the hearing. That being so, as we believe him to have acted properly, the ruling of the ALJ with respect to the petitioners' present contention is affirmed.

The next error alleged by the petitioners involves the ALJ's refusal to grant them a continuance at the end of the fifth day of the hearing, a Friday, after being made aware that counsel for the labor protestants would be engaged the following Monday, on behalf of the same organiza-

[5]In this regard, although such was not specifically noted by the ALJ, it is clear that the petitioners did not at any time seek to invoke the ICC's discovery procedures. *See* 49 C.F.R. § 1100.55.

tion, in a major abandonment case in Indianapolis, Indiana. As a consequence of that ruling, the petitioners contend, Missouri Pacific Railroad Company [MoPac] witness H. J. Vierling could not be cross-examined by labor counsel, and L&N testimony in rebuttal to labor and other witnesses was, over the objection of the unrepresented labor organizations, allowed into evidence.

As regards this contention of the petitioners, the court notes first that the labor petitioners have not at any time shown that it would have been impossible for them to obtain representation at both of the hearings under discussion. Also, the record indicates that said petitioners had at least limited representation throughout the hearing at issue. Of even greater significance, though, is the fact that counsel for the labor protestants was never excused by the ALJ from the L&N hearings. His absence on the dates in question thus was in violation of Rule 69 of the ICC's General Rules of Practice, 49 C.F.R. § 100.69 — a fact not unknown to the various petitioners at the time the continuance at issues was sought. This revelation, when coupled with the other pertinent facts, weighs heavily against the petitioners' position. When the relevant circumstances are viewed in their entirety, we very simply do not feel that the rulings of the ALJ complained of can reasonably be looked upon a constituting an abuse of his discretion. *See NLRB v. Glacier Packing Co., Inc.*, 507 F.2d 415, 416 (9th Cir. 1974).

The petitioners' final contention regards the limitations imposed by the ALJ on the cross-examination of MoPac witness H. J. Vierling. This contention, the court believes, also is without merit. As concerns the hearing in question, MoPac was directed by the Commission to appear and present testimony only as to one issue - why it (MoPac) had attemtped to withdraw its initial intervention in op-

position to the L&N applications. That being so, the ALJ properly limited questions asked of Mr. Vierling to "those relevant to the Commission's order concerning MoPac's intervention." Initial Decision, at 9; Joint Appendix (Vol. I), at 28. That an Administrative Law Judge, in such situations, has discretion to so limit cross-examination is well settled. *See NLRB v. Bryan Manufacturing Co.,* 196 F.2d 477, 478 (7th Cir. 1952).

The Certificate and Decision of the Interstate Commerce Commission served April 2, 1979 is, for the reasons stated above, AFFIRMED.

INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET NO. 27972[1]

LOUISVILLE AND NASHVILLE RAILROAD COMPANY—TRACKAGE RIGHTS—OVER GRAND TRUNK WESTERN RAILROAD COMPANY SOUTH BEND SUBDIVISION BETWEEN MUNSTER, LAKE COUNTY, INDIANA AND THORNTON JUNCTION, COOK COUNTY, ILLINOIS

Decided March 29, 1979

On appeal, initial decision reversed, the trackage rights and construction applications found to be in the public interest because the benefits to be gained from the proposal outweigh the local harmful environmental impacts.

J. H. Durkin and *R.H. Stalheber* for Missouri Pacific Railroad Company.

Fred R. Birkolz, Emried D. Cole, and *R. Lyle Key, Jr.,* for applicant.

William J. Scott, Hercules F. Bolos, Mary C. Ubatuba, Gordon P. MacDougall, Thomas Swabowski, Dale Anderson, Ronald Buikema, and *John D. Dillner* for protestants.

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[1]This decision also embraces Finance Docket No. 28464. *Louisville and Nashville Railroad Company Construction of Connecting Track Over Grand Trunk Western Railroad Company at Munster, Lake County, Indiana.*

CERTIFICATE AND DECISION

BY THE COMMISSION:

On July 7, 1978, the Administrative Law Judge denied Louisville and Nashville Railroad Company's (L&N) applications for trackage rights and for construction of connecting track. The proposal would allow L&N to consolidate switching facilities at Yard Center, in Dolton and South Holland, IL. The Administrative Law Judge concluded that approval of the applications would result in the elimination of duplicate rail facilities and would result in more efficient and economical operations, if it could be found that L&N could ensure that Yard Center would be operated in the manner proposed. He also found, however, that the rerouting of traffic into Yard Center would result in an increase in traffic. The size of the increase in traffic and the nature of the impact on the community surrounding Yard Center was the central issue at hearing and on appeal.

The Administrative Law Judge found that L&N had not shown that it would control the conditions at Yard Center, which is operated by Missouri Pacific Railroad Company (MoPac), so that the proposed benefits would actually accrue. He found that the evidence supported the imposition of eight conditions to insure acceptable levels of local public health, safety, and noise pollution. However, since there was no showing that L&N or MoPac would implement these conditions, he concluded that L&N had not satisfied its burden of proof and that the applications must be denied.

Appeals to that decision were filed by L&N and MoPac. Replies to the appeals were filed by: (1) People of the State of Illinois, Illinois Commerce Commission, John W. McGuiness and George B. Lee (Commerce Commission),

(2) Village of Lansing (Lansing), (3) Village of Dolton (Dolton), (4) Village of South Holland (Holland), and (5) The Attorney General of the State of Illinois (Illinois). A motion to strike was filed by L&N. Replies were filed by the Commerce Commission, Illinois, Lansing, Dolton, and Holland. L&N filed a pleading entitled, "Reply to Protestant's Exceptions." The Commerce Commission filed a motion to strike that pleading. Finally, MoPac filed a reply to motions to strike which were included in the replies filed by Lansing and Holland.

PROCEDURAL ISSUES

We will first dispose of the procedural issues raised by these pleadings. L&N's motion to strike portions of the replies will be denied. It is the policy of the Commission that a reply to applicant's exceptions is not the proper forum in which to raise exceptions to the findings of an Administrative Law Judge. *CRST, Inc.—Purchase—Lee Bros., Inc.*, 127 M.C.C. 328, 330 (1978). However, there are two reasons why these pleadings should be accepted in the instant proceedings. First, the Commission has an affirmative duty under the National Environmental Policy Act of 1969 (NEPA) and under its own regulations (49 CFR 1108) to review environmental issues. Secondly, the protestants agreed with the ultimate conclusion of the initial decision, denial of both applications, and the errors raised were with respect to findings which were not essential to the denial of the application.

We will accept L&N's pleading entitled "Reply to Protestant's Exceptions." Usually we would reject this type of pleading under rule 21(a) which prohibits a reply to a reply. However, protestants, in disagreeing with certain findings in the initial decision, raised numerous issues. Because of the complex issues raised in the replies in-

cluding many objections to rulings and findings of the Administrative Law Judge, it is appropriate to accept L&N's response to these issues.

We will also deny L&N's motion to strike the reply of Illinois. L&N has not been prejudiced by our accepting this pleading which was filed 2 days late.

Finally, we will also deny the motions to strike MoPac's pleading. First, MoPac is properly a party to this proceeding and has standing to file an appeal.[2] Secondly, the appendixes to MoPac's appeal should be accepted because they are public records and are relevant to the issues raised in the initial decision.[3]

We now turn to the substantive issues raised in these proceedings. Essentially, the trackage rights application was denied on environmental grounds. The Administrative Law Judge found that L&N had not shown that the conditions at Yard Center are consistent with acceptable levels of local public health, safety, and noise pollution. Therefore, he concluded that the applications, which in all likelihood would exacerbate these problems, would not be consistent with the public interest.[4]

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[2]MoPac filed a petition for leave to intervene on December 17, 1976, and then on January 18, 1977, submitted a letter to withdrew its petition. On April 29 the Commission ordered MoPac to participate in this proceeding. In the initial decision the Administrative Law Judge granted leave to withdraw. However, MoPac had not requested leave to withdraw at hearing and it appeared at hearing and submitted evidence.

[3]Appendix A is a settlement agreement between Illinois and Holland and MoPac concerning noise-abatement measures in connection with Yard Center. Appendix B is a State court order granting a motion to dismiss based upon this settlement agreement. Appendix C is another State court order disposing of litigation which was pending at the time of hearing and was referred to in the initial decision.

[4]49 U.S.C. 11344(c), formerly section 5(2)(b) of the Interstate Commerce Act, requires a determination of whether the application is consistent with the public interest.

1. *Environmental concerns and the "public interest" determination.* – During the past decade, this Nation has become increasingly concerned with environmental issues. Since passage of the NEPA, Federal agencies have been required to determine whether a decision is a major Federal action significantly affecting the quality of the human environment. However, even if there is a negative NEPA finding, i.e., no significant adverse effect, environmental impact still must be considered.[5] NEPA mandates that, "to the fullest extent possible*** public laws of the United States*** be interpreted and administered in accordance" with its policies.[6] In other words, NEPA mandates that environmental concerns are to be considered in determining if a transaction is in the public interest.[7]

2. *The weight to be given environmental concerns* – On a case-by-case basis, the benefits from a proposed action must be balanced against the harmful environmental impacts. An application should be denied only when the harmful environmental impacts far outweigh the benefits to be gained from the proposal.

What are the benefits to be gained from these applications? The Administrative Law Judge correctly found that approval of these applications would result in the elimina-

[5] The Commission has previously imposed environmental conditions in a rail proceeding which it found to be a major Federal action. *Burlington Northern, Inc. – Construction and Oper.*, 348 I.C.C. 388, 405 (1976). Although we are not aware of any cases in which the entire Commission or a division has imposed environmental conditions in proceedings after making a negative NEPA finding, we do not automatically preclude their imposition where a proper record is developed.

[6] 42 U.S.C 4332(1) (1970).

[7] 49 CFR 1108.3 provides:

> In accordance with section 101 of NEPA, adverse environmental effects should be minimized to the fullest extent practicable consistent with the national transportation policy ***.

tion of duplicating rail facilities by consolidating two freight yards which are 6 miles apart[8] and could result in more efficient and economic operations.[9] L&N will continue to operate an existing line in the Hammond area and will provide service to shippers and receivers located in that area.[10]

Opposition to the proposals has focused on the harmful environmental impacts.[11] The environmental protestants contend that the traffic diversion to Yard Center will be greater than estimated by L&N.[12] From our review of the record, L&N's estimate is substantially accurate. Applicant has also shown that Yard Center has adequate capacity to absorb the cars and the switching that is now handled at Hammond Yard.[13]

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[8]Under these proposals, L&N would reroute traffic presently handled at its South Hammond Yard and consolidate switching activities in Yard Center, in Dolton and South Holland, IL.

[9]The total net start-up cost incident to the proposal is estimated to be $1,238,319. The annual operating savings is estimated to be $299,583. After 4 years, L&N would benefit financially, Tr-1392, 1393, exhibits 4-8.

[10]Only one shipper in the Hammond area opposed the application at hearing; however, he testified for the purpose of airing complaints against L&N service rather than protesting the application.

[11]Opposition was also expressed by labor interests.

[12]L&N estimates approximately two trains per day will be routed through Yard Center. The number of cars to be added annually to Yard Center switching by Hammond trains is estimated to be approximately 62,000 cars. Exhibit I and Tr-pp 47-49.

[13]MoPac, who is in charge of day-to-day operations of Yard Center, originally opposed the application. MoPac contended in its petition to intervene in this proceeding that approval of this application would increase congestion at Yard Center and this might reduce efficiency, interfere with through trains, substantially increase the costs of operating Yard Center, and aggravate the environmental problems. However, MoPac's representatives testified at hearing that the

The environmental protestants also contend that the proposal will result in operational inefficiencies i.e., Amtrak trains will be delayed and railroad crossings will be tied up for lengthy periods. They argue that this proposal will result in problems with safety at grade crossings and noise and traffic congestion.

However, the Federal Environmental Impact Statement (FEIS) concluded that the traffic problems at Thornton Junction would be mitigated by the installation of power switches and crossover tracks. L&N has stated that it plans to install crossover tracks north of the Grand Trunk Western (GTW) connection and power controlled switches at Thornton Junction. This proposal will mitigate the blockage of grade crossings, one of the main concerns raised by protestants.

There are other environmental benefits to be gained from this proposal: the South Hammond classification year would be eliminated and noise, traffic, and safety problems in that area would be removed. Also, the FEIS concluded that this proposal would result in a net reduction of air pollutants and energy consumption because L&N traffic would be moving over a shorter route.

The evidence of record shows that the environmental concerns and adverse conditions essentially are preexistent. We conclude that the benefits both environmental and operational outweigh certain harmful environmental impacts; that the Administrative Law Judge committed reversable error by failing to reach this conclusion, and that the applications should be granted.

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opposition resulted from misunderstanding L&N's proposal. He stated that with an understanding that only two daily trains would be involved and with an installation of power switches, the level of interference would be considered insignificant.

L&N and MoPac argue in their exceptions, that the imposition of the conditions recommended by the Administrative Law Judge is beyond the Commmission's power. We do not agree. The only limitation on the Commission's power to impose conditions is that the conditions be reasonable. *Reed v. Meserve,* 353 F. Supp. 141 (D. N.H. 1973), affirmed, 487 F.2d 646 (1st Cir. 1973). We have determined that the facts of this case do not warrant the imposition of the conditions recommended by the Administrative Law Judge. All of the conditions proposed by him related to protecting against environmental consequences subject to the regulation of other Federal, State, and local agencies. We are particularly concerned that the record does not show the cost of compliance with the recommended conditions, many of which relate to local and State police power. We have no reason to believe that the railroads will fail to comply with all appropriate statutes and regulations administered by those agencies. However, in the event that they do not comply, those agencies and not this Commission are the appropriate authorities to enforce compliance.

We conclude that, subject to labor protective conditions, these applications are consistent with the public interest.

This decision does not significantly affect the quality of the human environment.

CHAIRMAN O'NEAL concurring in part:

I agree that the Commission has the power to impose environmental conditions even in the absence of a finding that a major environmental impact will result. I also agree that the conditions proposed by the Administrative Law Judge are largely within the control of other Federal, State, and local agencies.

Nonetheless, I believe that the Commission is in an ideal position to ensure compliance with those conditions, and that the decision should, at a minimum, require that the necessary fire hydrants and crossover tracks be installed.

COMMISSIONER STAFFORD, dissenting:

I believe that the applications should only be granted subject to the imposition of the following conditions:

There are no fire hydrants in Yard Center and the present firefighting system is time-consuming and cumbersome. From the evidence adduced at hearing. Yard Center does not contain adequate fire protection facilities. Applicant has not controverted this conclusion, nor shown that rehabilitation of the water main in Yard Center would be financially burdensome. The letter from South Holland Fire Department explains how the existing main could serve as as "feeder" main for two branch lines each with three hydrants. I strongly believe that the public interest requires the installation of hydrants.

The Administrative Law Judge also found that applicant should be required to develop plans to control and reduce grade crossing blockage. Blocked grade crossings was a major concern of protestants in this proceeding. The FEIS also studied this problem at section 4.4:

The proposed trackage rights acquisition would route an additional two trains a day through Yard Center and over the GTW Line. Although the level of traffic would be low compared to current rail activity, the additional trains would be long (over 100 cars) and existing traffic problems and safety hazards at grade crossing would be exacerbated.

The FEIS concluded that the traffic congestion at Thornton Junction would be mitigated by the installation

of power switches and crossover tracks. L&N has stated it plans to install crossover tracks north of the GTW connection and power controlled switches at Thornton Junction. This proposal will mitigate the blockage of grade crossing and will not unduly burden applicant, accordingly, I would condition approval of the applications upon installation of the crossover tracks and switches.

The Administrative Law Judge was also concerned with noise emissions and found that approval of the applications should be conditioned upon installation of an extensive sysem of noise abatement. It is uncontested that these applications will result in some increase of noise emissions, and that the community surrounding Yard Center is already subjected to noise levels which frequently violate Environmental Policy Act, State, and local noise standards.

To mitigate the noise emission problem, I would condition approval of the applications upon the submission of a noise abatement plan. This plan should include the elements discussed at section 6-4 of the FEIS, as well as the economic cost to the railroad.

Finally, Administrative Law Judge recommended that L&N be required to designate an official to be responsible for Yard Center, and also, designate a community relations representative. Review of the record indicates that the Administrative Law Judge correctly noted that the railroad and the surrounding community have had many problems. I recognize that the Administrative Law Judge's proposal would facilitate solving these problems. However, the harmful environmental impacts from this application are not so great that this condition is necessary to make the proposal consistent with the public interest. I do suggest, however, that L&N and MoPac implement this

condition, because, as the Administrative Law Judge observed, it would, "go a long way toward enhancing conditions for the railroads and the local public."

It is ordered:

1. In Finance Docket No. 27972 the proposed acquisition of trackage rights by the Louisville and Nashville Railroad Company over a 5.6-mile segment of the Grand Trunk Western Railroad Company mainline between Munster, IN, and Thornton Junction, IL is approved. It is certified that in Finance Docket No. 28464, the present and future public convenience and necessity require the construction and operation of a connecting track between the Grand Trunk Western Railroad Company and the Louisville and Nashville Company at Munster, IN.

Both applications are approved subject to conditions for the protection of employees as finally determined in *Norfolk and Western Ry. Co.— Trackage Rights—BN,* 354 I.C.C. 605 (1978) (reopened by decision served February 23, 1979). No change or modification shall be made in the trackage rights agreement without prior approval of the Commission.

2. Within 15 days after completion of the construction and the commencement of operations, applicant shall give written notice to the Commission of the dates construction was completed and that operations were commenced. Applicant shall also submit two copies of the journal entries required to record the cost of the construction transaction. If applicant established rates and charges on the line, it shall refer to the certificte and decision by date and docket number.

3. This decision is effective 30 days from the date of service. Unless the transactions are consummated within 1 year from the effective date, this decision shall be of no further force and effect. Applicant shall also notify the Commission when it has consummated the trackage rights transaction.

By the Commission, Chairman O'Neal, Vice Chairman Brown, Commissioners Stafford, Gresham, Clapp, and Christian. Chairman O'Neal concurring in part. Commissioner Stafford dissenting.

H.G. HOMME, JR.,
Secretary.

360 I.C.C.

(Seal)

INTERSTATE COMMERCE COMMISSION
DECISION
Finance Docket No. 27972
Service Date: July 19, 1979

LOUISVILLE AND NASHVILLE RAILROAD COMPANY TRACKAGE RIGHTS OVER GRAND TRUNK WESTERN RAILROAD COMPANY SOUTH BEND SUBDIVISION BETWEEN MUNSTER, LAKE COUNTY, INDIANA AND THORTON JUNCTION, COOK COUNTY, IL
Finance Docket No. 28464

LOUISVILLE AND NASHVILLE RAILROAD COMPANY CONSTRUCTION OF CONNECTING TRACK OVER GRAND TRUNK WESTERN RAILROAD COMPANY AT MUNSTER, LAKE COUNTY, INDIANA
Decided: July 12, 1979

In separate petitions filed, respectively, April 21, 22, and 26, 1979, the Villages of South Holland, Dolton, and Lansing, Illinois (Villages) sought administrative review of the decision of the Commission, served April 2, 1979. The State of Illinois, Environmental Control Division (E.C.D.), also filed a petition for administrative review of the April 2 decision on April 23, 1979. Each of the petitions was rejected by letter of Deputy Director Erenberg, dated May 2, 1979. The petitions were rejected because they sought reconsideration of the Commission's decision on the basis of a finding that the proceedings involve a matter of general transportation importance. 49 U.S.C. § 10327(g)(2), only provides for the Commission granting

reconsideration of a decision of a division, and not of the entire Commission, on the basis of a finding of general transportation importance. We acknowledge that these petitions were filed in accordance with then applicable Rule 98(e) of our General Rules of Practice, which allowed any party to seek discretionary review of a decision of the entire Commission on grounds of general transportation importance. This conflict between our rules and the statute has subsequently been addressed in Ex Parte No. 55 (Sub-No. 24A). *Rail Appellate Procedures - Revision of Rule 98 of the Rules of Practice, 49 C.F.R. 1100.98,* by decision served June 29, 1979.

On June 5, 1979, the Villages filed a joint appeal seeking reconsideration of the rejection of their respective petitions. Louisville and Nashville Railroad Company (applicant) filed a reply to the appeal, in which it requested that the rejected petitions be accepted and considered. In order to give the Villages and E.C.D. an adequate opportunity to present their arguments, we will accept their previously rejected petitions for administrative review. Those petitions will be treated and addressed as petitions seeking reopening and reconsideration pursuant to 49 U.S.C. § 10327(g)(1). A reply to the petitions of the Villages was filed by Missouri Pacific Railroad Company on May 7, 1979.

A joint petition fo reopening and reconsideration pursuant to 49 U.S.C. § 10327(g)(1) was also filed by the State of Illinois, Illinois Commerce Commission, John W. McGinness, and Jack O. Black on April 21, 1979. A reply to the petition was filed by applicant.

We have determined that the petitioners have not set forth arguments to justify granting reconsideration of our prior decision. Accordingly the petitions for reopening and reconsideration will be denied.

We will nevertheless address certain of the issues raised by the State of Illinois et al. and E.C.D., in their respective petitions, regarding the consideration given by the Commission to environmental factors in determining whether to approve a transaction. Firstly, in our prior decision we stated, at page 5, the environmental balancing test to be applied in each case. A modification of that statement is necessary to reflect the Commission's intention to administer its statutory duties to the fullest extent possible in accordance with the policies of the National Environmental Policy Act of 1969. As a result, the statement at page 5 that, "An application should be denied only when the harmful environmental impacts far outweigh the benefits to be gained from the proposal" should be modified by deletion of the word "far".

Secondly, we disagree with the contention of petitioners that we have considered only the incremental environmental impact of the proposed transaction. The record indicates that we previously considered the cumulative – both pre-existing and incremental – environmental effects of the transaction. We conclude, therefore, that our treatment of the environmental matters was proper.

It is ordered:

1. The joint appeal of the rejection of petitions for administrative review filed by the Villages of South Holland, Dolton and Lansing, Illinois, is granted and the petitions are accepted.

2. The petition for administrative review filed by the State of Illinois, Environmental Control Division is, on our own motion, accepted.

3. The petitions for administrative review are denied.

4. The decision of Chairman O'Neal served May 2, 1979, staying the effective date of the decision of the Commission served April 2, 1979, is vacated.

5. This decision shall become effective on the date it is served, and the decision of the Commission served April 2, 1979, shall become effective 20 days from the service date of this decision.

By the Commission, Chairman O'Neal, Vice Chairman Brown, Commissioners Stafford, Gresham, Clapp, and Christian. Chairman O'Neal and Commissioner Stafford voted to grant the petitions and to reopen the proceeding for the imposition of necessary environmental conditions.

/s/ Agatha L. Mergenovich
Secretary

SERVICE DATE
JUL 13, 1978

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 27972[1]

LOUISVILLE AND NASHVILLE RAILROAD COMPANY – TRACKAGE RIGHTS – OVER GRAND TRUNK WESTERN RAILROAD COMPANY SOUTH BEND SUBDIVISION BETWEEN MUNSTER, LAKE COUNTY, INDIANA AND THORNTON JUNCTION, COOK COUNTY, ILLINOIS

In the title proceeding, the acquisition of trackage rights that would allow the transfer of certain yard operations from Hammond, Ind., to Dolton-South Holland, Ill., found not shown to be in the public interest. Application denied.

In the embraced proceeding, the public convenience and necessity found not shown to require construction of connecting track related to the sought trackage rights. Application denied.

Fred R. Birkholz, Emried D. Cole, and *R. Lyle Key, Jr.,* for applicant.

John C. Danielson for Grand Trunk Western Railroad Company.

Stephen E. McIlwain for intervenor in support of the application.

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[1]This decision also embraces Finance Docket No. 28464, Louisville and Nashville Railroad Company Construction of Connecting Track Over Grand Trunk Western Railroad Company at Munster, Lake county, Indiana.

Barbara Anthony for Section of Energy and Environment, Interstate Commerce Commission.

Dale A. Anderson, Larry B. Blackwood, Ronald Buikema, Charles W. Chapman, John David Dillner, Thurman Ferree, Ted Rashkow, Edwin R. Riemer, and *Thomas Swabowski* for parties opposing the application.

Clyde G. Coble, Donald L. Lindsey, Gordon P. MacDougall, George J. Nixon, Jr., and *Patrick W. Simmons* for Labor interest.

John T. Coleman, J.H. Durkin, and *Jerry J. Hanenburg* for Missouri Pacific Railroad Company.

By Richard H. Beddow, Jr., Administrative Law Judge:

By application filed August 6, 1975, the Louisville and Nashville Railroad Company (L&N) proposes to acquire trackage rights over a 5.6-mile segment of the Grand Trunk Western Railroad Company (GTW) mainline between Munster, Ind., and Thornton Junction, Ill. In a related proceeding, L&N filed an application on April 29, 1977, for authority to construct and operate a 1,294-foot connecting track at Munster between the GTW and L&N Lines. These proposals would allow L&N to reroute traffic presently handled at its South Hammond, Ind., marshalling yard in order to consolidate switching actitivites at Yard Center, in Dolton and South Holland, Ill.

The title proceeding originally was referred to another Administrative Law Judge for hearing in Chicago, Ill., on April 4, 1977. The hearing was postponed and a prehearing conference was held on the same date. Subsequently, a final environmental impact statement prepared by the Commission's Section of Energy and Environment was prepared and served January 23, 1978. The Judge holding the prehearing conference became unavailable to the Commission and no report or order on the prehearing con-

ference was issued; however, the matter subsequently was set for oral hearing and assigned to this Administrative Law Judge for hearing and the issuance of an initial decision. Hearing was held at South Holland, Ill., on March 6, 7, 8, and 10, 1978, at Dolton, Ill., on March 9, 1978, and at Chicago, Ill., on March 13 and 14, 1978.

The city of Hammond, Ind., and the Grand Trunk Western Railroad Company appeared in support of the applications. Four Hammond shippers (Ferree Furniture Express, North American Refractories, Munster Lumber Company, Inc., and Rand McNally & Company) appeared in opposition; however, the latter three withdrew upon reaching an agreement with applicant regarding continuation of a basic level of service at their facilities. American Train Dispatchers Association, Brotherhood of Locomotive Engineers and United Transportation Union, all labor interests, also opposed the applications. Governmental interests opposing the granting of the applications represented the State of Illinois, Environmental Control Division, the Illinois Commerce Commission, and the Villages of Dolton, Lansing, and South Holland, Ill.

It also appears that on December 20, 1976, the Missouri Pacific Railroad Company (MoPac), petitioned for leave to intervene in opposition to the title application citing nine separate grounds in support of its requeset, that by letter of January 18, 1977, it sought, without explanation, to withdraw such petition, and that upon petition of the Village of Dolton and United Transportation Union the Commission, Commissioner Brown, found that some explanation of why the grounds raised in the MoPac petition are no longer valid is necessary and ordered that MoPac be required to participate in the proceeding.

At the close of the hearing on March 14, 1978, the applicant presented oral argument, in lieu of a brief in accor-

dance with the Judge's ruling and the Commission's notice in these specific proceedings of December 14, 1977, that "pursuant to Rules 66 and 86 of the General Rules of Practice, all parties should be prepared to present oral argument, in lieu of briefs, at the conclusion of the hearing if so ordered by the presiding officer." In keeping with the preferences of counsel for opposing parties in attendance at the latter stages of the hearing (and over the objection of Mr. Simmons for the United Transportation Union and Mr. Lindsey of the Brotherhood of Locomotive Engineers, who renewed request to file briefs), other parties were given the opportunity to file written closing statements, in lieu of oral argument, due 3 weeks after the close of the hearing. Such statements were timely filed by April 4, 1978, by the Villages of Dolton, Lansing, and South Holland, the Brotherhood of Locomotive Engineers, the State of Illinois, and jointly by the Illinois Commerce Commission and the United Transportation Union.

PRELIMINARY MATTERS

The joint statement filed by the Illinois Commerce Commission and the United Transportation Union, under a heading entitled "Argument" states "The Conduct Of This Proceeding By The Hearing Officer And By The Commission Is So Unfair As To Require Further Hearing." Six allegations of error are stated: A. Failure to follow the prehearing conference understandings; B. Failure to grant continuance after the first week of hearings; C. Failure to allow examination of the L&N-MOP operating agreement at yard center; D. Failure to allow briefs; E. Refusal to identify or receive the draft environmental impact statement; and F. Refusal to exclude operational portion of the FEIS in absence of verification from L&N. The argument concludes with a comment that

the examples of erroneous ruling show that further hearing is required to correct the prejudicial state of the record and favorable ruling is requested on the specific objections made therein to the rulings of the hearing officer.

In a similar vein, the State of Illinois Environmental Control Division also asks that the Commission defer action until an adequate environmental impact statement is prepared and a proper hearing conducted, contending that there were prejudicial rulings in respect to: refusal to allow time for hearing transcripts to be obtained before preparation of written statements; ordering continuation of the hearing on March 6 and 7, 1978; attempts to require counsel for some protesting parties to defer to others;; limitation of cross-examination of witness Vierling of the MoPac; and distributing protestants' written questions to be asked witness Vierling to his attorneys in advance. No argument in support of its contentions, other than those relating to environmental matters were advanced and none of these parties expressed their requests in terms of specific motions for relief.

A review of the record requires the conclusion that the noted allegations of error are unfounded, that the complaining parties were not prejudiced by any of the alleged errors; that rulings made were properly within the discretion of the Administrative Law Judge; that they were afforded fair treatment and due process under the Commission's rules and regulations; and that, accordingly, their requested findings in this respect and their appeal for further hearing are denied.

In view of the somewhat strident nature of the allegations noted above, it is considered necessary to comment further on the matter involved therein and, unfortunately, to call to attention of the practitioners involved, the Com-

mission's Canon of Ethics (49 CFR § 1100, Appendix A), especially Cannon 3.

As the parties are well aware, the Congress, through the Railroad Revitalization And Regulatory Reform Act of 1976, as well as the Commission, have established strict criteria in respect to the timely disposition of proceedings. The procedural nature of hearings otherwise are conducted in accordance with the Administrative Procedure Act (see especially 5 U.S.C., Sec. 556), and the Commission's General Rules of Practice (49 CFR 1100).

Rule 69 of our rules of practice provides that "When a practitioner enters an appearance at a hearing he will be expected to represent his client faithfully until the completion of the proceeding — A practitioner who has entered his appearance at the hearing shall not be permitted to withdraw from the hearing, or willfully to absent himself therefrom, except for good cause and whenever practicable, only with the permission of the presidilng officer. If a party or the person representing him shall, after entering an appearance, attempt to withdraw from the hearing in a manner other than that specified in paragraph (b) of this section, the Commission, on its own motion, or on motion of any party to the proceeding, may take such action as, in the interest of juistice and the protection of the lawful rights of all parties to the proceeding, the circumstances of the case may warrant, including the striking out of all or any part of any pleading of the offending party, — or the disciplining of the practitioner concerned."

Counsel MacDougall appeared on behalf of the United Transportation Union and filed the written statement on its behalf. He attended the hearing on March 6 and 7, 1978, absented himself without excuse on March 8 and 9, 1978, reappeared on March 10, 1978, and absented him-

self intentionally and without excuse on March 13 and 14, 1978. During his absence, Mr. Simmons, assistant state director of the Illinois state legislative board, a full-time employee of the United Transportation Union (who made an initial appearance, with the comment that he was represented by counsel MacDougall), was in attendance and participated on behalf of the union. Statements by several members of this union were presented on March 13, 1978, by counsel for the American Train Dispatchers Association on behalf of counsel. Mr. Swabowski made an appearance for the Illinois Commerce Commission on March 6, 1978, but did not otherwise attend, examine, or present witnesses. Mr. Blackwood appeared for the State of Illinois on March 6, 1978. He was present on March 6, 10, and 13, 1978, and participated in cross-examination of witnesses but was not present on March 7, 8, 9 and 14, 1978, and presented no witnesses on behalf of the State. He was not excused from attendance and did not seek to be excused (initially on March 6 he stated he has other matters scheduled for March 8 and 9 but near the close of the first day also stated he would not attend on March 7).

As noted, a prehearing conference was held in April of 1977. No report was issued, apparently because of the Judge's departure from this agency. Although the matter was set for hearing without any further comment upon items discussed at the prehearing conference, such as prefiling of evidentiary statements, the compiaining parties made no timely, formal effort by motion or petition to clarify matters or obtain relief they sought necessary. At the hearing, the parties were allowed adequate time to examine applicant's statements (the longest of eight statements was 12 pages), including a 2-hour and 40 minute recess starting at 10:50 a.m. on the first day of hearing (statements were distributed prior to the start of the hear-

ing). No showing is made of how the lack of provision for prefiling adversely affect these parties. No showing is made to justify their lack of diligence in seeking appropriate relief prior to the start of the hearing and it appears that such failure, followed by their susbsequent actions, could be found to constitute an attempt to take unfair procedural advantage of applicant in a manner that would affect the timely disposition of the proceedings.

The hearing assignment notice of the Commission dated December 14, served December 21, 1977, specifically stated an assignment for hearing on the 6th day of March 1978 (1 week), and that it was "A tentative time allowance." It also stated: "Pursuant to Rules 66 and 86 of the General Rules of Practice, all parties should be prepared to present oral argument, in lieu of briefs, at the conclusion of the hearing if so ordered by the presiding officer." At the beginning of the hearing, the parties were allowed to state their views with respect to scheduling of witnesses and labor witnesses were deferred on the first day of hearing because of the United Transportation Union's desire to have time available to prepare its presentation after hearing railroad witnesses. The term "tentative time allowance" of 1 week clearly implied that the matter could go for more than 5 days, no persuasive reasons were given that would justify a delay in the hearing between presentation of applicant's and protestants' evidence, and the record produced nothing that otherwise would warrant any such recess. Moreover, the Chairman of this Commission announced on September 30, 1977, that strict time limits would be implemented (specifically applicable to this type of proceeding), and that:

> Exceptions to our policy of strict adherence to procedural schedules will be granted only in those rare instances where it appears that the

> public equity or justice will be served. Absolutely no extension request, based on a practitioner's work schedule, such as absence from the office, vacation, or work on other proceedings, will be accepted.

And, as noted, neither the Illinois Commerce Commission nor the Illinois Environmental Control Division present direct evidence, they gave no indication that they would do so at any future time, and they, likewise, showed no reason why any continuance was necessary.

The notice of hearing clearly advised the parties to be prepared for oral argument in lieu of briefs. Applicant chose to so proceed, and several protestants also desired such a procedure. As an accommodation to the parties, this Administrative Court allowed anyone so desiring to put its argument, in written form, in lieu of any oral presentation, to be submitted 3 weeks after the close of the hearing. Obviously, it was within the Court's discretion not to allow briefs. Also, to allow these protestants time to obtain and examine the transcript would defeat the intent of having argument at the close of the hearing and it would be prejudicial to applicant and other parties that were prepared to abide by the Commission's notice and rules.

Regarding the Court's "attempts to require counsel for some of the protesting parties to defer to others", it is concluded that no parties were prevented from presenting evidence or conducting cross-examination that was relevant, material, or non-repetitious; that the parties were given more than adequate opportunity to arrange mutually acceptable scheduling of witnesses and the order of cross-examination; and that any ruling or instructions in

this area were consistent with the presiding officer's duties to regulate the course of the hearing under section 556 of the Administrative Procedure Act.

Turning next to the L&N-MoPac operating agreement, it is observed that production of this document first was sought at the prehearing conference by the United Transportation Union, the document was sent to the then presiding officer, no ruling was made regarding its submission, and no party made any formal effort prior to the hearing otherwise to require its disclosure. The request to examine it was renewed at the hearing; however, applicant claimed privilege because of sensitive commercial and financial data. The Administrative Court attempted to make the document available for counsels' view only; but union counsel declined that condition and declined to examine it subject to a protective order limiting the use of any information gained to purposes of this proceeding only. The document was reviewed by the Judge; the parties were given a brief summary of the contents that noted that the agreement provides rights and responsibilities for the L&N in Yard Center and makes labor protective provisions applicable to the L&N; and, in view of the nature of the agreement and the applicant's claim of privilege, it was ruled that the agreement not be open to general inspection. It is concluded that these complaining parties had a fair opportunity to examine the agreement subject to protetive conditions; that they voluntarily chose not to avail themselves of the opportunity; and that no valid basis exists for vitiating applicant's claim of privilege.

Matters relative to environmental considerations and the cross-examination of witness Vierling will be covered below. In summary, it is concluded that the complaining parties have failed to show that the hearing was conducted in a manner that denied them of a full and fair hearing. The development of a fair record, with proper representa-

tion of public interest has been achieved as a result of a candid and fair presentation by the applicant and the able presentation of other parties especially those representing the Villages of Dolton, Lansing, and South Holland. The remedy for any asserted, detrimental results, was within the control of the complaining parties through the exercise of diligent, competent representation under this Commission's rules. Accordingly, the rulings made at the hearing are affirmed. In view of the circumstances and the failures of counsel Blackwood, MacDougall, and Swabowski relative to Rule 69 regarding attendance at the hearing, it is considered necessary to admonish counsel that in conformance with the criteria of part (6) of that rule, future pleadings will be subject to a motion to strike by any party or on the Commission's own motion.

FACTUAL BACKGROUND

The nation's rail network tends to center on the Chicago metropolitan area with approximately 37 routes, 2,000 miles of right-of-way (with over 4,000 highway-railway crossings, less than half grade-separated), and 134 rail yards. Although none of the parties have presented evidence in respect to a comprehensive 1995 Transportation System Plan for the Chicago Area,[2] information from this study is referred to in the Final Environmental Impact Statement and it reveals that the objectives of the freight system involve the consolidation of rail right-of-way and terminal facilities in the existing system. Also intended is the streamlining of the present assertedly overextended system into one which is economically and operationally viable. Planned consolidation would be accomplished through the concentration of freight activity in specific

[2]Chicago Area Transportation Study. *Recommendation for the Chicago Area Freight System for 1995.* 1976 and *1995 Transportation System Plan Annual Update,* March 1976.

localized sites and the joint use of physical facilities. Under the proposal, both the South Hammond, Ind., and Yard Center, Ill., yards involved herein ultimately would be eliminated.

As noted, the purpose of the involved trackage rights application is to allow the L&N to reroute traffic presently handled at its South Hammond yard to Yard Center in Illinois. The latter yard is operated by the MoPac under an agreement which provides essentially equal rights and responsibilities for applicant L&N. Pertinent traffic of the L&N presently is handled over connecting rail lines to the north of the South Hammond and Yard Center locations. Under the proposal, pertinent L&N traffic would move over a shorter route south of these yards utilizing an approximate 6-mile segment of the Grand Trunk Line from Munster, Ind., (a few miles south of the South Hammond yard), through Lansing, Ill., to South Holland, Ill.

As pertinent, the L&N operates two essentially parallel routes south of Chicago. The easternmost (the Monon line), runs through South Hammond and western Indiana to Louisville, Ky., while the westernmost line (Evansville route), extends through Yard Center, eastern Illinois, and western Indiana to Evansville and the Kentucky State line, with connections, in both instances, to L&N lines in the southeast. Applicant will continue to operate the Monon line in the Hammond area and it will provide service to shippers and receivers located there; however, all car classification and switching would be made at Yard Center and approximately seven daily cars for South Hammond industries would be handled by a train out of Yard Center.

Applicant has a newly modernized yard facility at Louisville and traffic between Chicago and Louisville (and beyond points) is routed over the Monon line. Its present share of this type of traffic (with allowances), would

average one 104 car train northbound and one 90 car train southbound daily to be rerouted through Yard Center. The northbound train would arrive through the South Holland end of the yard in the early morning hours and the southbound train would depart during evening hours (also, after or before classification, the trains apparently would both leave and arrive through Dolton during daytime hours). Trains will be made up of preblocked arrangements of cars to facilitate switching and it is anticipated that classification and transfer functions will be enhanced and will result in faster service and improved interchange.

Applicant estimates that total net startup costs would be $1.2 million, including allowances for track work of $263,000, signal work of $623,000, and labor protection costs of $500,000. Annual net operating savings are calculated to be $300,000, based upon evaluation of 1977 costs of $1.8 through South Hammond as compared with costs of $1.5 million through Yard Center.

The Grand Trunk, in support of the application, indicates that it runs 18 trains (plus one yard train) daily over the trackage rights segment. It estimates that each grade crossing blocked would be somewhat over 2 minutes, that proposed improvements with the installation of new power control switches could improve existing grade crossing blockage problems, and that the additional two daily trains would not be considered to be a significant increase in train operation over the line. Past problems have occurred where trains are held on the line at various hours, with attendant engine noise as well as communication noise, prior to trains being able to enter the connecting track at Thornton Junction (with, in effect, the Evansville line), which leads into Yard Center in South Hammond.

Between Thornton Junction and Yard Center lies the site of a proposed automobile unloading facility which the MoPac plans to operate. As discussed below, this plan is the subject of litigation between MoPac and the Village of South Holland.

Yard Center is substantially larger than the South Hammond yard and it is considered that its multiple track layout has adequate capacity to absorb the 62,000 annual cars that would be added as a result of the proposed action. For a number of years, activities at Yard Center were at a minimal level and it appears that community activities, and the usage of non-railroad land near the yard, were coexistant without serious conflict. Several years ago, for a number of reasons, usage of the track to and from Yard Center and switching and classification activities at the Yard substantially increased. At the same time, changes took place in the South Holland area with a demise of farming-type activities and an increase in population and industrial land usage. Yard Center extends for a distance of 2 miles in a north-south direction. A grade crossing exists beyond the northern end of Yard Center, in Dolton, near a point where track of railroads other than those involved herein cross applicant's line. (In fact, Dolton, South Holland, Lansing and South Hammond are substantially crisscrossed with lines of the Grand Trunk and eight or more other railroads.) Moving south, 144 St. in Dolton has a grade crossing over several tracks at the start of the area of concentrated switching. A school and shopping centers (as well as the Village of Riverdale), are located to the west, while the main part of Dolton (including fire, police, and related services), are to the east. The Dolton-South Holland portions of Yard Center are divided by Sibly Blvd., which provides a non-grade east-west crossing (however, blockages at grade crossings frequently divert such a volume of traffic, that this routes ef-

fectiveness for use by emerging vehicles is severely curtailed). The next east-west crossing is approximately 1.25 miles south of Sibly Blvd., at U.S. Highway 6 in South Holland at the south end of Yard Center. It is a main east-west road and is a non-grade crossing. Thornton Junction is approximately .6 miles south of U.S. Highway 6. The southwestern corner of South Holland (including a residential area and two principal schools), is separated from the rest of the village by the Grand Trunk lines and crossed with two grade crossings. Almost a mile south of Thornton Junction is the east-west Tri-State Tollway (Interstate 80 and 294). Another major route, the Calumet Expressway (Interstate 94), runs north-south on the eastern borders of South Holland and Dolton at a distance of approximately 1.75 miles from the Yard Center complex.

Applicant has assessed the effect upon employment and determined that most employees at South Hammond (except crossing watchmen-type personnel), can be absorbed into the increased workload at Yard Center (or other locations based upon existing seniority options) and that total costs for labor protection would be less than $.5 million and would not extend beyond a 2-year period. Consolidation of forces is involved under the circumstances involved and applicant would protect employees under modified *New Orleans* conditions.[3] It is noted that any effect on locomotive engineers would be a shifting in their reporting point a distance of 7 miles.

Although the rights and responsibilities for use of Yard Center are shared by both MoPac and applicant L&N, actual operations are under the direct control of MoPac. The

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[3]See *Norfolk and Western Ry. Co. - Trackage Rights - BN*, 354 I.C.C. 605 at pages 607 and 608.

superintendent of the joint facility is technically a joint employee of both lines and the cost of his salary is allocated between the two; the check is a MoPac check and he is a 30-year veteran of service with MoPac and its predecessor. In his opinion, the yard can handle the contemplated additional traffic without problem or appreciable adverse effect upon the yard's operating efficiency. As superintendent, he only has been incidentally made aware of police ticketing of trains for excessive crossing blockage, he is only incidentally aware of noise complaints, and he apparently bears or accepts no responsiblities in relation to actions taken or not taken by MoPac relative to environmental or public safety matters. Based upon the superintendent's testimony, it is found that except for information on the physical handling of trains and cars he is not shown to be qualified to provide creditable, probative testimony regarding either the MoPac's or the L&N's overall operations of Yard Center. Applicant presented no other witness qualified to testify concerning Yard Center.

As noted below, some other information relating to Yard Center was provided by a MoPac vice president in response to its appearance regarding its petition to intervene. This witness' testimony also requires a finding that despite his title and theoretical responsibilities he is not shown to be knowledgeable and qualified to provide creditable, probative testimony pertaining to the operations of Yard Center.

Environmental concerns, especially with respect to noise pollution, led to action by State and local bodies which resulted in a proceeding involving studies and testimony regarding the noise problem at Yard Center and a decision finding violation of noise control ordinances. A 10-foot high earth beam was constructed near one portion of the

yard in South Holland and a few small deciduous trees were planted in apparent response to the decision.

Numerous local residents, school officials, fire, police, and emergency medical service personnel, and public officials testified regarding conditions at Yard Center and other rail locations that could be affected by additional traffic as a result of the application. This evidence shows that grade crossings are frequently blocked for excessive periods of time (frequently in violation of local ordinances), and that this causes serious problems with respect to the safety (and timely attendance), of school children, the provision of fire, police and emergency medical services, general safety, and inordinant waste of time (and energy). It also is shown that noise levels are such that they provide a high level of annoyance and interfere with both indoor and outdoor activities. Special concern is expressed over late night or early morning noise and that generated by specific actions such as the reving and idling of locomotives (especially at locations outside of Yard Center), coupling, decoupling, and marshalling noises, and amplified communication between employees. It also is shown that neither MoPac nor Yard Center provides reasonable access for communication between the public and the rail operation and, in fact, no feeling of concern or evidence of a cooperative climate is considered to exist.

A major problem area exists in providing fire services to Yard Center itself. Fires have occurred there in the recent past where the nearest water supply was some 600 feet away. Some fire hydrants exist on yard property but they essentially are inoperative and Yard Center has not cooperated in attempts to have the situation corrected.

MOPAC INTERVENTION

Witness Vierling, the vice-president of the eastern region of the MoPac, was presented in response to the Commission's order that it be required to participate in the proceeding in order to provide some explanation of why the grounds raised in its petition to intervene in opposition to the title application are no longer valid, as claimed in its attempt to withdraw.

Prior to the adjournment of the hearing on Friday March 10, the Judge asked that any parties who wished to cross-examine Mr. Vierling prepare copies of questions they would like to ask for submission to the Judge and counsel on Monday March 13, when the witness was to be called. Questions were prepared by the Villages of Dolton, Lansing, and South Holland. They were made available to counsel for MoPac over the noon recess of 1 hour and 45 minutes prior to Mr. Vierling's testimony (and subject to the provision that the witness could not be informed of the questions). When the afternoon session began, the questions were reviewed as to relevancy and repetition, some were excluded and examination was held. Basically, questions were limited to those relevant to the Commission's order concerning the MoPac intervention. In addition to pre-listed questions, other followup type questions and various clarifying questions also were allowed. In response to the noted objections of the Illinois Environmental Control Division, it is considered that they were necessary to regulate properly the course of the hearing and to provide for the exclusion of irrelevant and immaterial evidence. Also, the complaining party failed to even attempt to outline the areas of its interest in this witness and it did not bother to participate in his examination. Accordingly, it is hardly in a position to assert that it has been denied a proper hearing.

The record shows MoPac sought to intervene and then sought leave to withdraw. On December 17, 1976, in the MoPac petition to intervene, they stated that the yard is quite often extremely congested. That the application, if granted, would increase congestion, would reduce efficiency, would interfere with interstate through trains, would interfere with interstate traffic into and out of Yard Center, would substantially increase the cost of operating Yard Center and joint lines, and would aggravate and proliferate the environmental and highway crossing problems. The intervention pleading was prepared under the direction of Mr. Vierling, who, at the hearing, testified that MoPac had changed its position because it originally misunderstood what trains the L&N proposed to operate in and out of Yard Center and failed to understand that the L&N had proposed the installation of power switches at Thornton Junction and power crossovers between various running track. With an understanding that only two daily trains each would be involved and with the installation of power switches, it appears that level of interference would be considered insignificant.

Mr. Vierling formerly had testified on behalf of MoPac in 1976 in court in Illinois in a matter involving litigation filed by South Holland regarding environmental problems, primarily noise pollution, in the operation of Yard Center. The witness reluctantly agreed that he was aware of requests by the Commission's Section of Energy and Environment concerning information regarding a proposed automobile unloading facility to be located on MoPac land in South Holland along the track between Thornton Junction and Yard Center. The subject of that facility is a current matter of court litigation in Illinois between MoPac and the Village of South Holland. Such information was not provided; however, under examination

the witness did reveal that the facility would process some 30 to 35 rail cars daily. He did not know whether that figure included both empty and loaded cars, thus the total number of in and out cars involved daily could be in the 60-70 car range.

Mr. Vierling could not recall numerous aspects of matters pertaining to the operation of Yard Center and his railroad's relationship with L&N and its involved application. No probative information was volunteered regarding the operation of Yard Center in respect to ability to control and handle additional trains and cars or in respect to the MoPac's willingness and ability, as the entity responsible for Yard Center, to conduct operations in a manner consistent with local public interest, especially in relationship to fire hazards, traffic congestion and other aspects of public safety, and noise pollution.

ENVIRONMENTAL CONSIDERATIONS

Under the provisions of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332 (1970), the Commission has the duty to actively take appropriate step to comply with its responsibilities under that statute. Here, a Final Environmental Impact Statement was prepared which detailed the Commission's considerations in approximately 100 pages of text and charts, 27 pages regarding comments on the Draft Environmental Impact Statement, and 54 pages of appendices. Two witnesses from the Commission's Section of Energy and Environment responsible for preparation of the study, were made available and subjected to almost a full day of cross-examination. In addition, the independent consultant involved in noise studies covered in the statement spent a half day undergoing examination. The environmental impacts were summarized as follows:

The proposed action would allow applicant's planned elimination of its South Hammond, Ind., marshalling yard and consolidation of classification activities at Yard Center, Ill. Rail operations would increase at Yard Center by the addition of two trains a day via the GTW line. The increase in freight traffic would exacerbate existing noise, traffic, and safety problems in the affected communities. Some localized increases in air pollutants would also occur and the proposed action might open the way for more rail traffic in the future, depending on industrial development and unforeseen changes in rail traffic patterns.

The environmental benefits of this action would be regionally oriented in that classification operations at South Hammond would be eliminated, resulting in the removal of the noise, traffic, and safety problems associated with these activities. A land resource could be made available for public use. Furthermore, an overall savings in fuel consumption, as well as a net reduction of air pollutants, could be realized since much of L&N's traffic would be moving over a shorter route. The proposed action would be commensurate with land use plans at South Hammond and regional transportation goals.

Also, three alternatives to a complete approval of the proposed action were offered and discussed, including (1) denial of the applications, (2) imposition of conditions to prohibit consolidation of switching activities at Yard Center, or (3) imposition of requirements for noise abatement plans.

Several parties challenge the adequacy of the Final Statement and object to its receipt as an exhibit. Conversely, the United Transportation Union also objected to the failure to identify and receive the Commission's Draft Environmental Statement.

First, it is noted that both statements have been placed in the docket and are part of the record without the necessity of formal submission. Secondly, the Final Statement, when subject to cross-examination, properly should be identified and received (or rejected) as an aid to effective regulation of the hearing. The Initial Statement, in effect, is merely an underlying document upon which the Final is based, and need not itself be formally received. Moreover, the portion in the Initial Statement (but not in the Final), which the Union is concerned, concerns a recognition of the fact that a complaint proceeding is pending in Finance Docket No. 28480 involving applicant and the ownership of the Monon branch line. This is a matter of official knowledge. Moreover, the complainant in that case, the Southern Railway Company, had sought to intervene in the instant proceeding stating that divestiture of the former Monon lines from the L&N could be ordered and that the Southern would then seek to acquire those lines. By order of the Commission, Commissioner Christian, decided December 23, 1977, it was found that to allow Southern to raise this issue would unduly broaden the issues presented and leave to intervene was denied.

Next, it will be restated that the receipt into evidence of the Final Statement is restricted to the issue of the Commission's responsibilities under NEPA. The recitation of statements and factual type conclusions therein, unless otherwise presented by involved parties and subjected to procedural safeguards through cross-examination of

responsible witnesses, is not entitled to probative weight in respect to any issue other than a finding under the NEPA.

Some concern is voiced over the identity of the consultant utilized by the Section of Energy and Environment to conduct studies relative to noise pollution, inasmuch as at a prior time he served in a similar capacity for the applicant in a local environmental proceeding. Also, it was developed that the section arranged for applicant to pay the consultant for his efforts (because of apparent budget type constraints that might have resulted in a limitation of the scope of the environmental investigation). The consultant's credentials were checked with both the national and regional offices of the Environmental Protection Agency, with resulting positive recommendations, the section was aware of his prior services, and conditions were expressed disallowing contacts with the applicant and controlling aspects of the safety programs.

Although the Commission's employment of a consultant with a past relationship with the applicant, without the concurrence of other parties, has resulted in an opportunity for the raising of not unreasonable questions of concern, it is concluded that the record shows that the consultant is a responsible professional engineer employed by an independent non-profit research organization and that his contributions to the environmental statement are based on professional, unbiased standards and entitled to full probative weight in that respect.

Next, it is observed that a Federal action that may be considered to have certain negative effects on local conditions is not the equivalent of a major Federal action significantly affecting the quality of the human environment under the NEPA. Accordingly, the existence of local environmental problems does not mandate an adverse environmental conclusion. The problems must relate (1) to

the proposed Federal action, and (2) to overall regional or national concerns, as well as local. Here, environmental concerns and adverse conditions essentially are preexistent. They will not change in a "significant" way by the addition of the trains and cars to be switched or moved through Yard Center under applicant's proposal. Also, the negative effect upon Dolton, South Holland, and Lansing are counterbalanced by a positive environmental effect upon the Hammond area and a slight benefit in relation to air quality and fuel consumption (because of traffic moving over a shorter route). Noise and traffic congestion related to rail traffic would increase, especially in the Yard Center area; however, the impact, in relation to existing conditions, would not be consequential on an overall basis. Also, grade crossing problems and attendant safety concerns would intensify, but only to a slight degree, while the adverse effects on some existing traffic problems actually might be improved with the proposed installation of new switching and control devices on the existing tracks.

Increase in train traffic would be an effect that could not be avoided; however, the related effects of additional noise and congestion could be modified to some degree by the imposition of controlled operational habits (for example, conditions affect idling of engines at exposed locations for excessive periods or at late hours; holding open of crossing gates when a switch engine will approach but not cross a grade crossing; safety of school children and other pedestrians could be enhanced by the construction of less costly pedestrian overpasses at such locations as 144th Street in Dolton and 170th Street in South Holland; and additional over-underpasses could be constructed at grade crossings of the involved lines, or other lines that contribute to tieups in these communities. A grant would lead to the probable removal of the South Hammond Yard as a land resource available to rail transportation;

however, alternate use in the form of park development or other non-railroad use would be likely. The short-term effect of the action could increase local Illinois problems. In the long term it could promote efficiency in rail operation through the consolidation of switching operations and movement over shorter routes; however, it is not really shown how the latter concept actually fits into regional planning concepts inasmuch as Yard Center would be eliminated under the recommended 1995 Transportation System Plan for the Chicago area. The Final Environmental Impact Statement is considered to adequately satisfy the Commission's responsibilities under the NEPA.

Under these circumstances, the receipt of the Final Environmental Statement is affirmed; the conclusions therein are adopted (except as modified above); and it is concluded that the proposed trackage rights application (and attendant connecting line construction), are not shown to involve matters that require a finding that the proceedings be found to involve a major Federal action significantly affecting the quality of the human environment within the meaning of NEPA.

CONCLUSIONS

A trackage rights application can be approved if it intially is found that subject to such terms and conditions, and such modifications as are found to be just and reasonable, it falls within the scope of section 5(2)(a) and will be consistent with the public interest. Section 5(2)(c) requires that weight be given to four factors: the effect of the proposed transaction upon adequate transportation service to the public; whether other railroads should be included (not applicable herein); total fixed charges (also inapplicable herein); and the interest of affected carriers employees.

While the Commission's prime area of concern is the "public interest" in the broadest sense and thus consideration of a matter's affecting interstate commerce beyond merely local interests, issues of local public health, safety, and environment properly must be considered in the content of the Commission's overall evaluation of the standards under which a trackage rights application must be judged.

On the other hand, this proceeding is not the proper forum for exploration of matters collateral to the noted controlling issues. It is not the time or place to question the prior merger proceeding in which applicant was involved or to interpret labor agreements affecting that operation. It is not the place to question the adequacy of rail service to South Hammond receivers. It is not the proper proceeding in which to establish or enforce Federal noise standards for rail yards. And, it is not the proper forum for the State of Illinois and local communities to mount collateral attacks on environmental matters based upon their apparent inability to prosecute or enforce local ordinances.

A review of the record in the light of the pertinent criteria leads to the conclusion that approval of the proposal would result in the elimination of duplicating rail facilities and could result in more efficient and economical operations (with attendant savings), if it also could be found that applicant is able to ensure that Yard Center would be operated in the manner proposed. It also is considered that the interests of affected carrier employees would be appropriately protected.

Here, applicant has not shown that it has the ability to control or influence the control of operations and conditions at Yard Center (and attendant tracks), such that the Commission could reasonably conclude that the proposed

benefits would actually accrue. It has not shown that the conditions and day-to-day operations of Yard Center are consistent with acceptable levels of local public health, safety, and noise pollution factors and it is not shown that it has the ability to control or influence the implementation of acceptable conditions that would be required to be imposed. To the contrary, this record indicates an appalling lack of sensitivity and concern with public health and safety, noise pollution, and community relations on the part of the operators of Yard Center. Among many others, two things stand out as examples in support of the latter conclusion. These are the condition of the fire hydrants in Yard Center (and management's apparent lack of interest in corrective measures), and management's "token" noise pollution control efforts in installing inappropriate and insufficient plant material. As noted by a witness, the planting efforts were so grossly inadequate as to be an insult to the people of South Holland. Of course, the deficiencies in fire fighting facilities have been of especially high public concern as a result of recent publicity given to derailments and fires in other parts of the country.

For the above noted reasons, it would not be appropriate to grant the application subject to the imposition of conditions, however, it is noted that the record supports the imposition of conditions of the following nature as minimum just and reasonable requirements for approval of the application: (1) complete rehabilitation of the Yard Centers fire hydrants and water mains to standards acceptable to the Villages of Dolton and South Holland, (2) development of plans to more effectively control and reduce grade crossing blockage, including provisions for immediate emergency access to the control function by public safety officials, (3) joint construction with the Villages of Dolton and South Holland of pedestrian over-

passes at 144 St. in Dolton and 170 St., in South Holland, (4) development of plans to regulate and control the placement of idling equipment, (5) limitation to switch engines with lower noise emission ratings, (6) development of a plan and installation of an extensive system of suitable noise barriers around Yard Center, (7) designation of a specific official and an alternative to be responsible for Yard Center and related activities and facilities and the provision of access to these persons by appropriate local governmental officials, and (8) designation of a community relation representative with plans for the provision of timely receipt of an action on complaints.

As noed, the Commission has been given no reason whatsoever that would support a finding that applicant or MoPac could nor would implement and abide by conditions that would be required prior to approval of the proposal and, accordingly, it is concluded that applicant has failed to affirmatively satisfy its burden of proof and that the application must be denied.

Turning to the embraced proceeding and the request for authority to construct and operate a connecting track at Munster, it is concluded that this matter, governed under the public convenience and necessity standards of section 1(18) of the Act, is directly related to the trackage rights proposal. Inasmuch as that has not been approved, there is no need for the connecting track and the application will be denied. In the other related matter, the withdrawal request by MoPac, it is concluded that sufficient cause has been shown (and explained), to warrant the relief sought and it is hereby permitted to withdraw.

Finally, it is observed that the necessary conclusions made herein merely act to leave the parties where they were prior to the applications. No improvement in rail

facilities and service will be made, no improvements will be made in the Hammond area, and there need be no health, safety, and environmental improvements made in the Dolton-South Holland area. What on the surface is a reasonable, minor proposal for the rerouting of two daily trains must be denied because of the actions or non-actions of a "third party", that have resulted in an alienation of community relations. Although other forums do exists for the resolution of community-railroad problems, it is suggested that a voluntary approach to the matters listed above as feasible conditions, by the owners of Yard Center and the involved communities, could go a long way toward enhancing conditions for the railroads and the local public. And, on a more formal basis, it further is suggested that the time may be ripe for a review by the area railroads, the State of Illinois or other Chicago area organizations and this Commission's Rail Services Planning Office of the area's future carload and classification yard system as set forth in the Chicago Area Transportation Study, *infra*. Should this review indicate a need for timely action, an appropriate effort should be taken to institute a formal investigation proceeding by this Commission so that any future proceedings of this nature involving the Chicago rail crossroads might be evaluated on a record where probative information is available to allow proper consideration of the overall effect of the proposed action on rail service in the involved territory.

FINDINGS AND ORDER

Upon consideration of the record, it is found that in Finance Docket No. 27972 the proposed acquisition of trackage rights by the Louisville and Nashville Railroad Company on a 5.6-mile segment of the Grand Trunk Western Railroad Company mainline between Munster,

Ind., and Thornton Junction, Ill., is not shown to be consistent with the public interest; that in Finance Docket No. 28464, the public convenience and necessity is not shown to require or be enhanced by the construction and operation of a connecting track between the Grand Trunk Western Railroad Company and the Louisville and Nashville Railroad Company at Munster, Ind.; that this decision is not a major Federal action within the meaning of the National Environmental Policy Act of 1969; and that the applications should be denied.

It is ORDER of the Administrative Law Judge, that the applications be, and they are hereby, denied.

Dated at Washington, D.C., this 7th day of July, 1978.

By the Commission, Richard H. Beddow, Jr., Administrative Law Judge.

/s/ Nancy L. Wilson
Acting Secretary

United States Court of Appeals
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604
April 24, 1980

Before
Hon. LUTHER M. SWYGERT, Circuit Judge
Hon. PHILIP W. TONE, Circuit Judge
Hon. NICHOLAS J. BUA, District Judge*

PEOPLE OF THE STATE OF ILLINOIS, et al.,
Petitioners,

No. 79-1454

vs.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,
Respondents.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
Intervening-Respondent.

ON PETITION FOR REVIEW OF AN ORDER FROM THE INTERSTATE COMMERCE COMMISSION

This cause came on to be heard on the transcript of the record from the Interstate Commerce Commission, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the order of the Interstate Commerce Commission in this cause be, and the same is hereby, AFFIRMED, with costs, in accordance with the order of this court entered this date.

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*Honorable Nicholas J. Bua, U.S. District Court Judge for the Northern District of Illinois, is sitting by designation.

United States Court of Appeals
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604
June 5, 1980

Before
Hon. LUTHER M. SWYGERT, Circuit Judge
Hon. NICHOLAS J. BUA, District Judge*

PEOPLE OF THE STATE OF ILLINOIS, et al.,
Petitioners,

No. 79-1454

vs.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,
Respondents.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
Intervening-Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE INTERSTATE COMMERCE COMMISSION

On consideration of the petition for rehearing filed in the above-entitled cause by counsel for the petitioners, a majority of the judges on the original panel having voted to deny the same,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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*The Honorable Nicholas J. Bua, District Judge from the Northern District of Illinois, Eastern Division, is sitting by designation.

The panel which decided the appeal consisted of Judges Swygert, Tone and Bua. The petition for rehearing has been considered and acted upon by the judges remaining on the panel after April 30, 1980, the effective date of Judge Tone's resignation.

Supreme Court, U.S.
FILED
SEP 18 1980
MICHAEL RODAK, JR., CLERK

No. 80-41

In the Supreme Court of the United States

OCTOBER TERM, 1979

PEOPLE OF THE STATE OF ILLINOIS, ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

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PEOPLE OF THE STATE OF ILLINOIS, ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

QUESTION PRESENTED

Whether the Interstate Commerce Commission fulfilled its responsibilities under the Interstate Commerce Act and the National Environmental Policy Act in approving a consolidation of railroad facilities at Yard Center, Illinois, without imposing safety and environmental conditions to guarantee railroad compliance with local, state, and other federal regulations.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 5

Conclusion 9

TABLE OF AUTHORITIES

Cases:

Burlington Northern, Inc.—Control & Merger, St. L., 360 I.C.C. 784 6

Chicago, R.I. & P. R.R. v. *Chicago, B. & Q. R.R.*, 437 F. 2d 6 2

Concord Township v. *United States*, No. 79-1887 (3d Cir. June 23, 1980) 8

Cross-Sound Ferry Services, Inc. v. *United States*, 573 F. 2d 725 8

Environmental Defense Fund, Inc. v. *Armstrong*, 352 F. Supp. 50, aff'd, 487 F. 2d 814, cert. denied, 416 U.S. 974 7

Greater Boston Television Corp. v. *FCC*, 444 F. 2d 841, cert. denied, 403 U.S. 923 5

Hanly v. *Kleindienst*, 484 F. 2d 448, cert. denied, 416 U.S. 936 7-8

Kleppe v. *Sierra Club*, 427 U.S. 390 9

Page

Cases—Continued:

Strycker's Bay Neighborhood Council, Inc. v. *Karlen*, No. 79-168 (Jan. 7, 1980) 9

Vermont Yankee Nuclear Power Corp. v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519 9

Statutes:

Administrative Procedure Act, 5 U.S.C. 706(2) 8

Interstate Commerce Act, recodified by Pub. L. 95-473, 92 Stat. 1337 *et seq.* 2

49 U.S.C. 10901 2

49 U.S.C. 11343 ..... 2, 6

49 U.S.C. 11344(c) 8

National Environmental Policy Act, 42 U.S.C. 4321 *et seq.* 3

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-9a) is not reported. The decision and order of the Interstate Commerce Commission (Pet. App. 10a-22a) are reported at 360 I.C.C. 115.

JURISDICTION

The judgment of the court of appeals (Pet. App. 57a) was entered on April 24, 1980. A petition for rehearing was denied on June 5, 1980 (Pet. App. 58a). The petition for a writ of certiorari was filed on July 10, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Louisville and Nashville Railroad Company ("L&N") operates two roughly parallel routes between Chicago, Illinois, and Nashville, Tennessee, and maintains a separate freight classification yard[1] for each line, one near South Hammond, Indiana, and one approximately six miles away at Yard Center near Dolton, Illinois. In 1975 the L&N concluded that by dispensing with the independent operation of the Hammond Yard and consolidating these operations at Yard Center, it could save approximately $300,000 annually. In order to implement its consolidation plan by rerouting traffic from the Hammond Yard to Yard Center, L&N needed the approval of the Interstate Commerce Commission under

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[1]At a classification yard, the railroad performs various switching operations either to add cars to, or to separate cars from, a train. Those operations enable the railroad to control the composition of a train.

49 U.S.C. 11343[2] for its acquisition of trackage rights[3] over 5.6 miles of the Grand Trunk Western Railroad Company ("GTW") and also needed authority from the Commission under 49 U.S.C. 10901[4] to construct a short connecting track between its line and the main line of the GTW.

L&N filed its application for trackage rights and a construction certificate in August 1975. The Commission's environmental impact statement prepared in connection with L&N's application concluded that the consolidation of classification activities would increase noise, traffic and safety problems in the area of Yard Center, but would eliminate those problems at the Hammond Yard, which was to be terminated (Pet. App. 47a). On balance, the statement concluded that the environmental consequences of the consolidation would be beneficial, stating (*ibid.*):

> A land resource [at South Hammond] could be made available for public use. Furthermore, an overall savings in fuel consumption, as well as a net reduction of air pollutants, could be realized since much of L&N's traffic would be moving over a

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[2]Formerly Section 5(2) of the Interstate Commerce Act, 49 U.S.C. (1976 ed.) 5(2). The Act was recodified by Pub. L. 95-473, 92 Stat. 1337 *et seq.* Generally, Section 11343 provides that railroad consolidations, mergers, and the acquisition of control or rights over another carrier's property must be authorized by the Commission.

[3]"Trackage rights" involve continuing or permanent easements or licenses granted to one carrier permitting it to operate over the track and right-of-way of another carrier. *Chicago, R.I. & P. R.R.* v. *Chicago, B. & Q. R.R.*, 437 F. 2d 6, 10 (7th Cir. 1971).

[4]Formerly Section 1(18) of the Interstate Commerce Act, 49 U.S.C. (1976 ed.) 1(18). That section requires a railroad carrier to obtain a certificate of public convenience and necessity to construct a new railroad line.

shorter route. The proposed action would be commensurate with land use plans at South Hammond and regional transportation goals.

After a hearing, a Commission administrative law judge ("ALJ") recommended that the application be denied (Pet. App. 27a-56a). The ALJ concluded, *inter alia*, that: (1) the proceedings did not involve a major federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act ("NEPA"), 42 U.S.C. 4321 *et seq.* (Pet. App. 51a); (2) "the proposal would result in the elimination of duplicating rail facilities and could result in more efficient and economical operations (with attendant savings)" (*id.* at 52a); and (3) this proceeding was not the proper forum to establish or enforce noise standards for rail yards or to entertain collateral arguments raising other environmental concerns (*ibid.*).

Notwithstanding those conclusions, the ALJ denied the application on the basis of "local public health, safety, and noise pollution factors" at Yard Center (Pet. App. 53a). The ALJ was particularly concerned about inoperable fire hydrants and the need to develop noise pollution control measures (*ibid.*). He indicated that the transaction should only be approved subject to certain enumerated conditions[5] but that the L&N had not shown its "ability to control or influence the implementation of acceptable conditions * * *" (*ibid.*). The ALJ reasoned that since the record did not indicate that the railroad operators[6] of Yard Center "could or would implement and

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[5]The specific conditions are set out at Pet. 5-6; Pet. App. 53a-54a.

[6]Yard Center is jointly owned by the L&N and the Missouri Pacific Railroad Company ("MoPac"). Each owns a 50% interest in the facility. Both carriers have equal rights and responsibilities with respect to Yard Center, although, by agreement, MoPac operates the yard.

abide by conditions that would be required prior to approval of the proposal" the application should simply be denied (*id.* at 54a).

On review, the Commission reversed the ALJ and granted trackage rights and the construction application (Pet. App. 10a-22a). In analyzing the environmental issues, the Commission balanced the operational and environmental benefits against the adverse environmental consequences. Benefits noted by the Commission included (1) the elimination of duplicating rail facilities through consolidation of the two freight yards (*id.* at 14a-15a); (2) elimination of noise, traffic, and safety problems in the Hammond area (*id.* at 16a); and (3) a net reduction of air pollutants and energy consumption through shorter and more efficient operations (*ibid.*). The Commission also observed (*ibid.*) that the L&N's planned installation of crossover tracks and power controlled switches would mitigate certain potential traffic congestion problems that were a main concern of those opposing the plan. The Commission concluded that since the environmental and operational benefits outweighed the harmful environmental impacts, the application should be granted. In addition, the Commission determined that on the facts of this case, imposition of the conditions recommended by the ALJ was not warranted, since there was no reason to suppose that L&N would not comply with relevant safety and environmental ordinances, which the Commission noted (*id.* at 17a) are outside its province and are properly enforced by other federal, state, and local agencies.

On petition for review in the court of appeals, petitioners argued principally that the Commission

applied contradictory standards in weighing environmental impacts,[7] that the Commission erred in reversing the ALJ without adequate findings, and that the Commission committed certain procedural errors. Petitioners made only one passing reference to NEPA.

In its decision affirming the Commission's order the court of appeals found no inconsistency in the Commission's findings with respect to the environmental impact of the proposed action (Pet. App. 4a) and rejected petitioners' procedural claims. On the issue of whether the Commission had adequately explained its reasons for reversing the ALJ, the court of appeals found (*id.* at 5a, quoting *Greater Boston Television Corp.* v. *FCC*, 444 F. 2d 841, 853 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971)) that the Commission "more than 'made clear not only its awareness of what the [ALJ] had concluded, but also its reasons for taking a different course.' " The court of appeals did not address petitioners' argument regarding deference to local regulations.

ARGUMENT

This case rests largely on its own peculiar facts and presents no conflict among the circuits or legal issue of general importance warranting this Court's review. The Commission's decision in this case approving the L&N's proposed plan of consolidating two freight yards does not present a question of its responsibilities under NEPA. The Commission made an unchallenged finding that this case did not involve a major federal action significantly affecting the quality of the human environment within the meaning of NEPA. Nevertheless, it fully considered the

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[7]This argument, not pursued here, was premised on the application of different standards in the Commission's decision on the merits and the Commission Chairman's decision granting an administrative stay (see Pet. App. 2a-4a).

environmental impacts presented. The Commission's decision to reverse the ruling of its ALJ and approve the plan without imposing environmental conditions was based on the Commission's judgment, affirmed by the court of appeals, that those conditions were not necessary to ensure compliance with environmental standards.

1. Petitioners' principal argument in favor of review rests on an asserted need to clarify the Commission's environmental responsibilities under NEPA in passing upon railroad facility consolidations under 49 U.S.C. 11343 (formerly Section 5(2) of the Interstate Commerce Act). Petitioners contend (Pet. 10-11) that in view of several announced railroad merger plans that will be considered by the Commission under the latter statute, this case provides the Court with an opportunity to "settle" the law at an early stage.[8]

Petitioners' argument is insubstantial. This case, which even the ALJ characterized as "a reasonable, minor proposal for the rerouting of two daily trains" (Pet. App. 55a), is demonstrably insignificant in comparison with the cases and proposed mergers cited by petitioners that have been or will be decided under the same statute.[9] Moreover, in light of the Commission's unchallenged finding (Pet. App. 17a) that its approval of L&N's

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[8]49 U.S.C. 11343 governs the Commission's consideration of major railroad mergers as well as such relatively minor matters as the trackage rights application involved in this case.

[9]For example, in *Burlington Northern, Inc.-Control & Merger, St. L.*, 360 I.C.C. 784 (1980), cited by petitioners (Pet. 10), the Commission considered the merger of two major railroad systems into a single system operating over more than 29,000 miles of track through the northern tier of states between the Pacific Northwest and the Great Lakes, and between the Great Lakes and the Gulf of Mexico (360 I.C.C. at 793). In contrast, the trackage rights issue considered under the same statute in this case involves 5.6 miles.

application is not a major federal action within the meaning of NEPA, this case is not a proper vehicle for the Court to define the Commission's environmental responsibilities in this area.[10]

2. Petitioners' second contention (Pet. 11) is that the Commission's refusal to impose environmental conditions raises significant jurisdictional and procedural problems under NEPA.[11] This contention is also without merit. Petitioners' reliance on *Environmental Defense Fund, Inc.* v. *Armstrong*, 352 F. Supp. 50, 58 (N.D. Cal. 1972), aff'd, 487 F. 2d 814 (9th Cir. 1973), cert. denied, 416 U.S. 974 (1974). and *Hanly* v. *Kleindienst,* 484 F. 2d 448, 449 (2d

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[10]Even assuming that the Commission's refusal in this case to enforce compliance with certain local, state, and federal regulations through imposition of conditions somehow falls short of its responsibilities under NEPA, the case does not present a question of substantial or recurring importance. Although the Commission determined that the facts of the case did not warrant imposition of the environmental conditions recommended by the ALJ (Pet. App. 17a), it unequivocally rejected arguments that it does not have the power to impose reasonable conditions (*id.* at 14a n.5 & 17a). The Commission has not foreclosed its option to take a more activist approach in the future in imposing environmental conditions should the situation warrant it.

[11]Logically, one does not reach the question of whether the Commission's statement concerning enforcement of compliance with environmental statutes and regulations constitutes a failure to meet its responsibilities under NEPA, unless one assumes noncompliance with environmental regulations. The ALJ's recommended conditions were premised on that assumption, *i.e.*, that the railroad operators of Yard Center could not be trusted to comply with certain environmental standards. The Commission itself was unwilling to make that assumption, stating that it had no reason to believe that the railroads would fail to comply (Pet. App. 17a). Thus, the issue presented by the Commission's refusal to impose environmental conditions in this case is not directly related to NEPA, but rather is a question of whether the Commission gave adequate reasons for reversing the ALJ. The court of appeals correctly held (Pet. App. 5a) that the Commission "more than" made clear its reasons for reversing the ALJ.

Cir. 1973), cert. denied, 416 U.S. 936 (1974), is misplaced. Neither these cases nor any other authority we are aware of obligates each federal agency to require compliance with the health and safety regulations of other agencies. It is not the Commission's function to enforce such compliance. In this case, the Commission analyzed and balanced the environmental factors, based upon an environmental impact statement, in the context of carrying out its statutory obligation to determine whether the proposed transaction would be "consistent with the public interest" (49 U.S.C. 11344(c)). Petitioners do not challenge the Commission's balancing approach or cite any authority demonstrating that that approach is inconsistent with NEPA.[12]

In essence, petitioners would have the Court substitute its judgment for that of the Commission as to the environmental consequences of the Commission's action.[13] That approach repeatedly has been soundly

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[12]Petitioners argue, implicitly (Pet. 12), that the Commission did not fully consider the cumulative impact at Yard Center resulting from a series of transactions approved by the Commission. The Commission specifically rejected that allegation on petition for administrative review (Pet. App. 25a). Moreover, the environmental impact statement that was the basis for the Commission's balancing of benefits and adverse impacts considered both the pre-existing and incremental (*i.e.*, cumulative) effects of the plan.

[13]It also appears that petitioners are here advocating a new standard of judicial review in passing on the merits of agency action *after* preparation of an impact statement. Although some courts have taken the position that NEPA requires that an agency decision not to prepare an impact statement should be measured by a standard of reasonableness (see *Concord Township* v. *United States*, No. 79-1887 (3d Cir. June 23, 1980), slip op. 10-11, and authorities cited therein), none has applied that standard to the merits of the agency's decision following preparation of the impact statement. Rather, the courts in such circumstances have applied the traditional arbitrary and capricious standard of the Administrative Procedure Act, 5 U.S.C. 706(2). See, *e.g.*, *Cross-Sound Ferry Services, Inc.* v. *United States*, 573 F. 2d 725, 731-732 (2d Cir. 1978).

rejected by this Court. See *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen*, No. 79-168 (Jan. 7, 1980); *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 555 (1978); *Kleppe* v. *Sierra Club*, 427 U.S. 390, 410 n.21 (1976).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1980

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SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-41

PEOPLE OF THE STATE OF ILLINOIS,
Et Al. - - - - - - - - - Petitioners,

versus

INTERSTATE COMMERCE COMMISSION,
Et Al. - - - - - - - - - Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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August, 1980

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CONTENTS

PAGE

Question Presented 1

Statement of the Case 2

Reasons Why the Writ Should be Denied 4

1. The "Question Presented" Was Not Adequately Raised Before the Court of Appeals 4
2. The Question Presented Is Not an Important and Recurring Legal Problem Which Merits This Court's Review 5
3. The ICC Did Not Defer its Environmental Responsibilities to Other Agencies; It Merely Rejected Inappropriate "Environmental" Conditions Suggested by One of its ALJ's 6

CITATIONS

Cases:

	PAGE
Adickes v. *Kress & Co.*, 398 U. S. 144, 147 n.2 (1970)	4
American Trucking Associations, Inc. v. *United States*, 242 F. Supp. 597, 599 (D.C.D.C. 1965), *aff'd per curiam*, 382 U. S. 373 (1966)	8
NLRB v. *Sears, Roebuck & Co.*, 421 U. S. 132, 163-64 (1975)	4
Ramsey v. *Mine Workers*, 401 U. S. 302, 312 (1971)	4

Statutes:

49 U.S.C. § 11343	5

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-41

PEOPLE OF THE STATE OF ILLINOIS,
ET AL. - - - - - - - - *Petitioners,*

v.

INTERSTATE COMMERCE COMMISSION,
ET AL. - - - - - - - - *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Louisville and Nashville Railroad Company ("L&N"), respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Seventh Circuit's opinion in this proceeding.

QUESTION PRESENTED

In a proceeding in which the Interstate Commerce Commission found that the benefits of a proposed transaction, both environmental and operational, outweighed certain harmful environmental impacts and

that environmental concerns and adverse conditions were essentially preexistent, did said Commission err in declining to condition its grant of authority to consummate said transaction upon certain so-called environmental conditions suggested by one of its Administrative Law Judges.

STATEMENT OF THE CASE

Respondent L&N accepts Petitioners' "Statement" with the following additions and corrections.

The Interstate Commerce Commission's ("ICC") Administrative Law Judge ("ALJ") made the following findings in addition to those quoted by Petitioners:

> "Here, environmental concerns and adverse conditions essentially are preexistent. They will not change in a 'significant' way by the addition of the trains and cars to be switched or moved through Yard Center under applicant's proposal. Also, the negative effect upon Dolton, South Holland, and Lansing are counterbalanced by a positive environmental effect upon the Hammond area and a slight benefit in relation to air quality and fuel consumption (because of traffic moving over a shorter route). Noise and traffic congestion related to rail traffic would increase, especially in the Yard Center area; however, the impact, in relation to existing conditions, would not be consequential on an overall basis. Also, grade crossing problems and attendant safety concerns would intensify, but only to a slight degree, while the adverse effects on some existing traffic problems actually might be improved with the proposed in-

stallation of new switching and control devices on the existing tracks." (Pet. App., p. 50a).

"On the other hand, this proceeding is not the proper forum for exploration of matters collateral to the noted controlling issues. . . . It is not the proper proceeding in which to establish or enforce Federal noise standards for rail yards. And, it is not the proper forum for the State of Illinois and local communities to mount collateral attacks on environmental matters based upon their apparent inability to prosecute or enforce local ordinances." (Pet. App., 52a).

Also, Respondent does not concur with Petitioners' statement that the ICC rejected the ALJ's proposed conditions because they related to areas subject to the regulation of other agencies, because other agencies were the appropriate authorities to enforce compliance, and because the cost of compliance was not shown in the record. (Pet., p. 7). These considerations may have had some bearing on the Commissioner's decision to reject its ALJ's suggested conditions, but the Commission also discussed the facts of the case that related to environmental concerns and concluded that said facts did not warrant imposition of the ALJ's suggested conditions. (Pet. App., pp. 16a-17a).

REASONS WHY THE WRIT SHOULD BE DENIED

1. The "Question Presented" Was Not Adequately Raised Before the Court of Appeals

The petition should be summarily denied for the simple reason that the "Question Presented" framed by Petitioners was not among the four issues they raised before the United States Court of Appeals for the Seventh Circuit. (Pet. App., pp. 3a-6a). The question Petitioners have submitted to this Court was set forth only as argument, on page 24 of their brief to the Seventh Circuit, in support of Petitioners' contention that the Commission failed to present adequate findings in its Certificate and Decision to support its reversal of the ALJ's initial decision. The issue raised in Petitioners' "Question Presented" was not covered in the Seventh Circuit's discussion of the aforementioned "reversal without adequate findings" issue. (Pet. App., pp. 4a-5a).

Thus, as a result of Petitioners' failure to adequately raise the issue embraced in their "Question Presented" before the Seventh Circuit, this Court will not have the benefit of a lower court opinion on said issue. It is well settled that:

> "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *accord, NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 163-64 (1975); *Ramsey* v. *Mine Workers*, 401 U.S. 302, 312 (1971).

Accordingly, this Court need give this matter no further consideration.

2. The Question Presented Is Not an Important and Recurring Legal Problem Which Merits This Court's Review.

There are additional reasons why the writ should be denied. Notwithstanding Petitioners' contention that the involved issue is of public importance, the question presented does not represent an important recurring legal problem which merits this Court's review. The Court is, in essence, being asked to consider whether or not the Commission erred in declining to condition a grant of authority upon certain conditions suggested by one of its ALJ's, and any decision with respect to that matter would be inextricably linked to the facts of this proceeding.

Petitioners also argue that this case would have precedential value with respect to future railroad unifications. (Pet., pp. 10-11).

Even though the involved trackage rights project is governed by 49 USC § 11343, the same statute that governs railroad mergers, it is difficult to visualize very much, if any, other connection between:

(1) A transaction in which one railroad seeks to effect a yard consolidation by acquiring trackage rights over a 5.6 mile stretch of another railroad[1] for contemplated use by two trains per day[2];

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[1]Pet. App., p. 28a.

[2]Pet. App., pp. 38a-39a.

And

(2) A merger proceeding in which two or more railroads seek to unify their systems.

3. The ICC Did Not Defer Its Environmental Responsibilities to Other Agencies; It Merely Rejected Inappropriate "Environmental" Conditions Suggested by One of its ALJ's.

Notwithstanding their statement of the "Question Presented," Petitioners are in reality asking this Court to find that the ICC erred in declining to condition certain authority upon eight so-called environmental conditions suggested by one of its ALJ's. Petitioners suggest that in rejecting the ALJ's recommended conditions, the Commission disregarded its responsibilities under the National Environmental Policy Act ("NEPA") and in essence deferred to local, state, and other federal agencies for control of alleged environmental consequences. (Pet., pp. 11-13). Petitioners' argument is without merit since the Commission clearly has discretionary power to determine whether or not conditions suggested by one of its ALJ's are appropriate in the context of a given case. Such conditions are not prima facie reasonable or appropriate just because they are suggested by an ALJ, and NEPA does not require that the Commission impose such conditions when it finds them inappropriate.

Contrary to Petitioners' allegations that the Commission ignored its environmental responsibilities, the record clearly shows that the environmental impacts of the proposed transaction were exhaustively considered.

The Commission's Section of Energy and Environment prepared an Environmental Impact Statement with respect to this case[3], the ALJ devoted an entire section of his order to "Environmental Considerations,"[4] and the full Commission thoroughly considered the environmental aspects of the proposed transaction.[5] The Commission noted that:

> ". . . [T]he Federal Environmental Impact Statement (FEIS) concluded that the traffic problems at Thornton Junction would be mitigated by the installation of power switches and crossover tracks. L&N has stated that it plans to install crossover tracks north of the GTW connection and power controlled switches at Thornton Junction. This proposal will mitigate the blockage of grade crossings, one of the main concerns raised by protestants.
>
> "There are other environmental benefits to be gained from this proposal: the south Hammond classification [yard] would be eliminated and noise, traffic, and safety problems in that area would be removed. Also, the FEIS concluded that this proposal would result in a net reduction of air pollutants and energy consumption because L&N traffic would be moving over a shorter route.
>
> "The evidence of record shows that the environmental concerns and adverse conditions essentially are pre-existent. We conclude that the benefits both environmental and operational outweigh certain harmful environmental impacts;

[3]Pet. App., p. 28a.
[4]Pet. App., pp. 46a-51a.
[5]Pet. App., pp. 14a-17a.

> that the Administrative Law Judge committed reversible error by failing to reach this conclusion, and that the applications should be granted." (Pet. App., p. 16a).

The Commission went on to say that:

> "We have determined that the facts of this case do not warrant the imposition of the conditions recommended by the Administrative Law Judge. (Pet. App., p. 17a).

As was noted on pages 7 and 8 of the petition, the Commission stated that the conditions suggested by the ALJ related to matters subject to the regulation of other Federal, State, and local agencies and that those agencies rather than the Commission were the appropriate authorities to enforce compliance. Review of the eight suggested conditions on pages 53a and 54a of Petitioners' appendix reveals that only three of them relate to bona fide environmental matters.

Proposed condition No. 1 relates to fire hydrants and water mains, purely local matters with respect to which the ICC has no jurisdiction or expertise. Proposed conditions Nos. 2 and 3 cover grade crossing blockage and pedestrian overpasses, two areas which are also without the jurisdiction and expertise of the ICC. It is well settled that authority over public safety at rail-highway grade crossings is peculiarily within the police power of the states. Please refer to the 11 decisions of this Court which are cited for that proposition in *American Trucking Associations, Inc.* v. *United States,* 242 F. Supp. 597, 599 (D.C.D.C. 1965),

aff'd per curiam, 382 U.S. 373 (1966). Proposed conditions Nos. 4, 5, and 6 deal with noise-abatement measures and are the only ones which deal with matters which can logically be characterized as "environmental." The Commission was aware that such environmental matters at the involved railroad yard had been the subjects of a suit filed by the State of Illinois (one of the Petitioners herein) in the Circuit Court of Cook County, Illinois, and that such noise-abatement measures had been addressed in a "Settlement Agreement" which resulted in the dismissal of that action. (Pet. App., p. 13a n.3). Proposed conditions Nos. 7 and 8 relate more to public relations than to environmental concerns, and the Commission again has no jurisdiction or expertise with respect to railroad-community relations.

It is thus apparent that the Commission did not ignore its obligations under NEPA. It exhaustively considered the environmental issues which had been raised, and in an appropriate exercise of its discretion, concluded that the evidence of record did not support the imposition of conditions such as those suggested by its ALJ. Petitioners may question the wisdom of the Commission's exercise of its discretion to reject the ALJ's suggested conditions and claim that said exercise of discretion constituted error, but such matters are not among those which call for issuance of a writ of certiorari by this Court.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be denied.

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October Term, 1980

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Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents.

REPLY BRIEF

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REPLY BRIEF

Petitioners submit this reply brief addressed to the contention of the Solicitor General that the I.C.C. found approval of the freight yard consolidation is not a major federal action within the meaning of National Environmental Policy Act of 1969 (USA Br., pp. 6-7):[1]

> "Moreover, in light of the Commission's unchallenged finding (Pet. App. 17a) that its approval of L&N's application is not a major federal action within the meaning of NEPA, this case is not a proper vehicle for the Court to define the Commission's environmental responsibilities in this area."

The I.C.C. made no such finding. An Environmental Impact Statement was prepared by the agency's en-

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[1]The order of the Court of Appeals is now reported at 622 F.2d 591.

vironmental staff in accordance with section 102(2)(C) of NEPA. 42 U.S.C. 4332. (Pet. App. 28a). The I.C.C.'s decision made its typical finding at the end that its decision "does not significantly affect the quality of the human environment." (Pet. App. 17a). But this finding does not track the words of NEPA, and was not intended to do so.

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